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In The

Supreme Court of the United States

October Term, 1987

No. 87-

CITY OF EVANSTON, a municipal corporation, JOAN W. BARR, ANN RAINEY and NORRIS LARSON,

Petitioners,

vs.

REGIONAL TRANSPORTATION AUTHORITY, a municipal corporation, SUBURBAN BUS DIVISION OF THE REGIONAL TRANSPORTATION AUTHORITY, a municipal corporation, NATIONAL STEEL SERVICE CENTER, INC., a corporation organized and existing under the laws of the State of New Jersey and URBAN MASS TRANSPORTATION ADMINISTRATION, a division of the United States Department of Transportation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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QUESTIONS PRESENTED FOR REVIEW

1. Do the plaintiffs have standing under the Urban Mass Transportation System Act, ("UMT Act") NEPA, and the Adminstrative Procedures Act?

2. Were the allegations in the complaint sufficient to state a cause of action under the UMT Act and the National Environmental Policy Act in the face of the Motion to Dismiss?

PARTIES TO THE PROCEEDING BELOW

The plaintiffs-appellants in the United States Court of Appeals for the Seventh Circuit were the City of Evanston, a municipal corporation and home rule unit of the State of Illinois, Joan W. Barr, Mayor of the City of Evanston and Ann Rainey and Norris Larson, Aldermen of the City of Evanston, representing the ward in which the subject property was located.

The defendants-appellees were the Regional Transportation Authority ("RTA"), a municipal corporation of the State of Illinois, the Suburban Bus Division of the Regional Transportation Authority, ("PACE"), a division established within the Authority pursuant to the Illinois statutes, the National Steel Service Center, Inc. ("National"), and the Urban Mass Transmit Administration ("UMTA"), an agency of the defendant United States Department of Transportation ("DOT").

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The City of Evanston, a municipal corporation, and Joan W. Barr, Ann Rainey and Norris Larson, petition for writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit rendered on July 10, 1987.

OPINIONS BELOW

The Seventh Circuit decision of July 10, 1987 is reprinted in full as Appendix A to this petition.

The opinion of the trial court entered by Minute Order on June 27, 1986 is reprinted in full as Appendix B to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 10, 1987. No petition for rehearing was filed.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. §1254. Further jurisdiction is found under 49 U.S.C. §161, *et seq.*, 42 U.S.C. §4321, *et seq.*, and 5 U.S.C. §702, §706. This Petition for Writ of Certiorari has been filed in accordance with 28 U.S.C. §2101.

STATUTES INVOLVED

This case involves the provisions of the Urban Mass Transportation Act, the National Environmental Policy Act and the Administrative Procedures Act. The relevant sections are found in the appendix as Appendix E.

STATEMENT OF THE CASE

This is an action brought by the City of Evanston, a home rule municipality of the State of Illinois and three individuals as public officials and residents and taxpayers of the City. The individual plaintiff Barr is the Mayor; plaintiffs Rainey and Larson are aldermen of the ward in which the subject property is located. The litigation arises out of a federal grant from the Urban Mass Transportation Administration to the Suburban Bus Division of the Regional Transportation Authority for the purpose of acquiring the subject property then owned by National Steel, and utilizing the existing building for a bus maintenance and garage facility. The facility would be operated by Nortran, a transportation provider in the north

and northwest suburbs of the Chicago metropolitan area under contract with PACE.

The cause was initiated by a complaint filed by the plaintiffs, together with a motion for a temporary restraining order. The defendants filed motions to dismiss. The trial court without hearing granted the motions to dismiss without leave to amend the complaint. The trial court in a minute order dated June 27, 1986, stated that the plaintiffs failed to allege the requisite standing to invoke the court's jurisdiction. The trial court held that the invocation of jurisdiction under 28 U.S.C. §1331 and §2201 failed because 42 U.S.C. §4332 and 49 U.S.C. §1602(d), the federal statutes upon which the allegations were based did not create a private right of action and none was implied.

The court further held that the plaintiffs lacked the requisite personal stake in the outcome and failed to allege the requisite standing of injury in fact to interests sought to be protected, such as property or environmental interests. The court further found that plaintiffs failed to allege interests that differ from the public at large and that the complaint failed to sufficiently allege an injury that is distinct and palatable, concrete and immediate or an injury of an environmental nature as opposed to pecuniary loss. The court further held that the plaintiffs lacked taxpayer standing which was limited strictly to challenging the exercise of Congressional power as opposed to a decision by the executive branch.

The defendant RTA is a municipal corporation, organized for the purpose of providing aid and assistance for public transportation in the northeastern area of the State of Illinois. The defendant, Suburban Bus Division ("PACE") is a division established within the RTA. It is the operating division responsible for providing public transportation by bus. The City of Evanston, and the subject property at 2424 Oakton Street are located within the territorial jurisdiction of the RTA and PACE.

The defendant Urban Mass Transportation Administration, an agency of the defendant United States Department of Transportation, is established pursuant to the provisions of the Urban Mass Transportation Act (49 U.S.C. §1601, *et seq.* and is commonly known as UMTA. The defendant National Steel Service Center, Inc. is a New Jersey corporation, which at the time of filing of the suit was the owner of the property at 2424 Oakton Street in Evanston. The property contained approximately 9-7/10 acres of land, together with a building occupying 58,000 square feet.

The subject property is zoned for the M-4 Manufacturing District under the Zoning Ordinance of the City of Evanston. Under that zoning ordinance the use of the property for a bus maintenance service and inspection facility requires a special use permit. Pursuant to Urban Mass Transportation Act, PACE applied for and received from UMTA a grant for the purpose of acquiring the Oakton Street property from National Steel and utilizing it for a bus maintenance, inspection and garage facility. The facility was to be operated by Nortran, the transportation provider in the north and northwest suburbs under contract to PACE. UMTA provided 3.5 million dollars for land acquisition, engineering, initial construction and PACE was seeking a grant of an additional 1.9 million dollars pursuant to UMTA Act, §3 (49 U.S.C. §1602), to complete funding for construction.

Because this matter was determined on motion to dismiss, it is necessary to review in some detail the allegations of the complaint and the motion for temporary restraining order. The complaint asked for a declaratory judgment that the contract under which PACE was to acquire the subject property from the defendant National Steel Service Center, Inc. was totally null and void and that the action of PACE and UMTA in allegedly agreeing to pay $2,650,000 for purchase of the subject property was

arbitrary, unreasonable and void as against public policy. The complaint further sought a declaration that the failure to provide an environmental impact statement was contrary to law and rendered the alleged agreement and grant null and void. The complaint further asked for a declaration that the location of the proposed facility would be highly detrimental to the environment and public health and safety of the plaintiffs.

Coupled with the complaint for declaratory relief was a request that the defendants be restrained from taking any steps to consummate the transaction and from disbursing any funds for the purchase of the subject property. The action was brought under the provisions of the Urban Mass Transportation Assistance Act of 1970, and the National Environmental Policy Act of 1969. The right to review federal agency's actions was found in the Administrative Procedures Act and specifically 5 U.S.C. §702.

The complaint which appears as Appendix C in the appendix identified the parties and indicated the jurisdiction of the court under 28 U.S.C. §1331 and 28 U.S.C. §1332. The complaint in paragraph 15 further alleged that PACE had applied to DOT, Urban Mass Transportation Administration, for a grant for the purpose of acquiring the property from its owner for the purpose of utilizing the land and building for a bus garage facility. That under the provisions of 49 U.S.C. §1602, no application for a grant to finance the acquisition, construction, reconstruction or improvement of facilities or equipment which substantially affects the community shall be granted without notice and public hearings. Any such application shall include a certification that the applicant has afforded adequate opportunity for public hearings pursuant to adequate notice and "has considered the economic and social effects of the project and its impact on the environment" and "has found that the project is consistent with official plans for the comprehensive development of the urban area". 49 U.S.C. §1602(b)

It was further alleged that no certification had been made that the applicant had considered the economic and social effects of the project or its impact upon the environment or has found that the project is consistent with official plans for the comprehensive development of the urban area. That, in fact, the project is not consistent with official plans for the comprehensive development of the urban area and no environmental impact study had been made.

The complaint further alleged that the City had requested UMTA to provide an environmental impact study and statement but UMTA had taken the position that this project is a "categorical exclusion" because it constituted the construction of the new bus storage and maintenance facility "in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning located on or near a street with adequate capacity to handle anticipated bus and support vehicle traffic." It was alleged that, in fact, the facility is located in an area without adequate capacity to handle anticipated bus and support vehicle traffic and is inconsistent with the existing zoning. (Comp. ¶16)

It was further alleged that the Northeastern Illinois Plan Commission had conducted a "A-95 hearing" on the project. Such a hearing was a condition precedent to the implementation of the grant and that the project was included in the hearing. That as a result of hearing the official project review recommendations of the NIPC included objections to the proposed acquisition and construction of the garage facility at 2424 Oakton Street and that the notice for the hearing restricted the cost of the proposed improvement to $2,352,620. (Comp. ¶17)

It was alleged that pursuant to the provisions of 42 U.S.C. §4332, all agencies of the federal government must include in every recommendation and report on proposals for major federal actions significantly affecting the quality of the human environment a detailed statement by the

responsible official of the environmental impact of the proposed action, including any adverse environmental effects which cannot be avoided should the proposal be implemented, alternatives to the proposed action, the relationship between local short-term uses of men's environment and the maintenance and enhancement of long-term productivity and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. That as indicated UMTA had taken the position that such environmental impact statement was not needed and that the failure of UMTA to provide such statement renders the proposed grant null and void. (Comp. ¶18)

In paragraph 20 of the complaint, the plaintiffs alleged that the executive director of PACE purported to enter into a contract with National Steel Service Center, Inc. to purchase the property for $2,650,000. The complaint further alleged that the City of Evanston had caused an appraisal to be made of the value of the land and buildings to be acquired under the agreement of sale and the appraisal indicated a value of $1,425,000. It was alleged that the purchase of the subject property for $2,650,000 was an unreasonable use of public funds and an improper exercise of the authority of the defendants PACE and UMTA and that the expenditure of more than one million dollars above the appraised value of the property, was without lawful authority and constituted a violation of the fiduciary duty owed to the public, including the plaintiffs, by PACE and UMTA and a palpable abuse of discretion.

In paragraph 23, it was specifically alleged that the location of the proposed bus facility at 2424 Oakton Street would be highly detrimental to the public health and welfare of the individual plaintiffs and the City of Evanston in that it would increase congestion in the public streets already overburdened in and about the subject property; that it would deprive the City of Evanston and its citizens

of the use of said property for its highest and best use for a taxpaying facility; that it would violate the zoning ordinance and comprehensive plan of the City of Evanston by allowing an inharmonious land use to be located within the corporate limits of the City and that by reason of congestion, pollution, noise and other adverse environmental impacts, it would depreciate surrounding property values and interfere with the use and enjoyment of nearby residential properties.

It was further alleged that the agreement of sale dated May 5, 1986 was unreasonable, invalid and void and was against public policy because it constituted an abuse of discretion by purporting to pay an amount in excess of a million dollars over the fair cash market value of the property and that the alleged contract was never approved in the specific amount by the Board of Directors of PACE. The complaint further alleged that the contract was null and void by reason of lack of proper notice and that the A-95 review allegedly conducted by the Northeastern Illinois Planning Commission was totally invalid in that the notice understated the amount of money involved in the acquisition of the subject property.

Finally, it was alleged that the defendant UMTA had failed to provide the environmental impact statement required by 42 U.S.C. §4332 in that the funding and construction of the development was a major federal action and not within the categorical exceptions applicable to environmental impact statements. It was alleged that the location of the proposed facility would be highly detrimental to the environment, and the public health and safety of the individual plaintiffs and the City of Evanston and the approval of the grant by UMTA without consideration of the environmental impact, the traffic conditions present, and the comprehensive plan and zoning of the City, was arbitrary, unreasonable and contrary to law.

There was appended to the complaint the ordinance of the Suburban Bus Division purporting to authorize the executive director to negotiate the acquisition of the subject property and the agreement of sale between National Steel Service Center, Inc. and PACE. Also appended was the appraisal of Neil J. King, undertaken at the request of the City of Evanston and indicating the market value of the subject property as $1,425,000.

The plaintiffs' motion for temporary restraining order was supported by the affidavit of Joel Asprooth, the City Manager of Evanston, who verified the allegations of the complaint and stated that the proposed use of the subject property was not permitted under the Zoning Ordinance of the City of Evanston and that no special use for the facility had been granted by the City, and that the location of the facility on the subject property would be contrary to the comprehensive plan of the City. Asprooth further indicated that the City had retained Neil King for the purpose of making the appraisal and that the appraisal indicated that the fair cash market value of the property was $1,425,000 and not $2,650,000.

Asprooth's affidavit further stated that Nortran, the agency which furnished bus transportation in the north and northwest suburban areas of Cook County has expressed its opposition to the use of the bus facility at the location proposed and that the City of Evanston is a member of Nortran and is fully aware of the position and desires of Nortran. Asprooth's affidavit further stated that the removal of the subject property from the tax rolls of the City of Evanston would be highly detrimental to the financial welfare of the City and that it would remove one of the City's most desirable and substantial parcels for industrial or commercial development from the tax rolls and that the location of the proposed facility at 2424 Oakton Street, Evanston would be highly detrimental to the traffic pattern in the area and would

produce congestion, pollution and noise which in turn would depress surrounding property values as well as cause traffic problems. Appended to this petition are true and correct copies of the original complaint filed by the City, (Appendix C) together with the Motion for a Temporary Restraining Order (Appendix D) and the Affidavit of Asprooth.

On appeal, the Court of Appeals for the Seventh Circuit determined that the UMTA Act does not create a private right of action and none can be implied. It cited several opinions for the proposition that neither the language nor the legislative history of the UMTA Act suggested that the Act was intended to create federal rights to a special benefit to a class of persons but rather was intended to benefit the public at large through a general regulatory scheme to be administered by the Secretary of Transportation. It held that neither the statutory language itself nor the committee report offered support for the plaintiffs' right to sue under the statute; therefore, the plaintiffs could not proceed under the UMTA Act.

The Court of Appeals in considering standing under NEPA recognized that several courts, including this court, have held that NEPA, 42 U.S.C. §4332, does, in fact, create a private right of action, but that no environmental impact statement need be prepared where the proposed action will not significantly affect the quality of the environment. It noted the categorical exclusion which it said was most applicable to the controversy. The Court recognized that it was not necessary to plead evidence but concluded that the plaintiffs did not suggest any reason why the categorical exclusion should not apply. The court said that the complaint was framed in general boilerplate language which demonstrated no specific relation to these plaintiffs for this property and that the plaintiffs had not sufficiently demonstrated that they have standing under NEPA. It thus concluded that the plaintiffs could not bring

the action under the UMTA Act because it created no private right of action and none is implied and that the plaintiffs had failed to demonstrate sufficiently that they have standing under NEPA. The Court of Appeals therefore affirmed the Court's order dismissing the complaint.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The writ should be granted in this case because the decision of the Seventh Circuit Court of Appeals is clearly in conflict with the decisions of this Court on the question of standing and on the prerequisites for pleading in the federal court. On the question of standing it is contrary to this Court's decision in *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 72 L.Ed.2d 182, 102 S. Ct. 1825 (1982); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 60 L.Ed.2d 66, 99 S.Ct. 1601 (1979); *Duke Power Co. v. Carolina Env. Study, G.P.*, 438 U.S. 59, 57 L.Ed.2d 595, 98 S.Ct. 2620 (1978); *Arlington Heights vs. Metropolitan Housing Corporation*, 429 U.S. 252 50 L.Ed.2d 450, 97 S.Ct. 555 (1978); *Cannon v. University of Chicago*, 441 U.S. 677, 60 L.Ed.2d 560, 99 S.Ct. 1946 (1979), *United States v. SCRAP*, 412 U.S. 669, 37 L.Ed.2d 254, 93 S.Ct. 2405 (1973), as well as numerous other decisions of this court and other federal courts of review.

On the pleading question the opinion is squarely in conflict with the basic views of this court as set forth in *Conley v. Gibson*, 355 U.S. 41, 2 L.Ed.2d 80, 78 S.Ct. 99 (1957); *Foman v. Davis*, 371 U.S. 178, 9 L.Ed.2d 222, 83 S.Ct. 227 (1972); *United States v. Houghman*, 364 U.S. 310, 5 L.Ed.2d 8, 81 S.Ct. 13 (1960); and *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 71 L.Ed.2d 214, 102 S.Ct. 1114 (1982).

It must be emphasized that the result of the opinion is to bar a municipality, such as the City of Evanston and its officials, from questioning the arbitrary and unlawful decisions of the Urban Mass Transportation Administra-

tion and to effectively bar the citizens of the community from insisting on the environmental protection mandated by Congress under NEPA. The court's view that no private cause of action can arise under UMTA is based upon cases which are clearly distinguishable and do not touch upon the question of a municipality's right to question federal actions as they relate to properties within the municipality.

The opinion of the Court of Appeals necessarily will have the effect of precluding a trial on the merits when, as here, a municipality has sound and verifiable reasons for opposing a federally funded transportation project which violates its comprehensive plan and its Zoning Ordinance and creates environmental hazards clearly actionable under NEPA. This court should not countenance a final dismissal based upon an original complaint which clearly sets forth the factual bases for a federal cause of action. This opinion, if allowed to stand, effectively cuts off the right of any municipality to challenge the acts of the Urban Mass Transportation Administration regardless of how deleterious its activities may be, and defeats the basic purpose of the National Environmental Policy Act.

I.

THE CITY OF EVANSTON AND ITS MAYOR AND ALDERMEN HAVE STANDING TO SUE UNDER UMTA, NEPA AND APA

This case involves the basic question of whether a city, its elected officials and its residents have the right to bring an action challenging the use of more than two and a half million dollars of federal funds to install a facility which is highly detrimental to the environment and public health and safety of the City and its citizens. The trial court without affording the plaintiffs the right to demonstrate the very real and immediate harm resulting from the arbitrary federal action dismissed the cause on motion simply by finding lack of standing. The appeals court's holding effec-

tively leaves the community and its citizens without any meaningful recourse against arbitrary action and unconsciable use of public funds by a federal agency.

The allegations of the complaint clearly set forth that the proposed use of the property at 2424 Oakton Street in Evanston would significantly diminish property values in the immediate area including adjacent residential property; would create traffic problems and would otherwise be highly detrimental to the public health, safety and welfare. The affidavit of Joel Asprooth, City Manager, indicates that the proposed use would be in violation of the Evanston Zoning Ordinance and comprehensive plan and that the proposed user of the facility, NORTRAN, an organization consisting of representatives of several municipalities is, in fact, opposed to the use of such facility. Notwithstanding the obvious fact that federal rules require only notice pleading, the district court erroneously granted motions to dismiss on grounds of lack of standing without affording the plaintiffs the opportunity to introduce evidence to support their allegations of real and distinct damage, both to the City and to the individual plaintiffs, and entered judgment without affording an opportunity to amend the complaint.

The right of judicial review where, as here, a legal wrong has been committed because of an agency action, is clearly set forth in the Administrative Procedures Act. The provisions of 5 U.S.C. §702 provide in part:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute, is entitled to judicial review thereof."

Under 5 U.S.C. §706 the reviewing court has the right to hold unlawful and set aside agency actions, findings and conclusions found to be "arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law."

The wrongs alleged by the plaintiffs herein, in specific

and concrete terms, include the abuse of discretion on the part of UMTA in purportedly entering into an agreement to purchase the subject premises for more than a million dollars in excess of their value. The other contentions of the plaintiffs include the failure of the federal agency to make an environmental impact study or assessment required under 42 U.S.C. §4332. The federal agency has approved more than Three Million Dollars to fund a project having a major impact upon the environment without any environmental study. Moreover, the facts alleged in the complaint show that the funds are to be used under a contract for which no formal official approval had been given by the Board of the defendant PACE and for which improper notices have been given in an effort to obscure the transactions involved. The result of the appeals court's opinion is to leave unchallenged and, in fact, unchallengeable this misuse of federal funds and perversion of local law.

The Court of Appeals in its opinion, concedes that the allegations of fact in the complaint must be taken as true. Those allegations clearly state a cause of action under the Administrative Procedures Act, 5 U.S.C. §702, as well as the Urban Mass Transportation Act and the National Environmental Policy Act. The appeals' court opinion recognizes that plaintiffs alleged jurisdiction under the Admnistrative Procedures Act in their opposition to defendants' motion to dismiss and on appeal. Nevertheless, the court failed to address standing under that statute. The court correctly stated that we failed to set forth 5 U.S.C. §702 in our original complaint. However, it is clear that the Administrative Procedures Act is not an independent grant of federal district court subject matter jurisdiction, *Califano v. Sanders*, 430 U.S. 99. The provisions of 5 U.S.C. §1702-06 do not in themselves constitute independent ground of subject matter jurisdiction but serve to confer standing upon the parties suffering legal wrong because of agency action or adversely affected or aggrieved

by agency action, *Acasta v. Gaffney*, 558 F.2d 1153. The requirement that the allegation of jurisdiction be made in the complaint does not necessarily require the setting forth of 5 U.S.C. §702. The jurisdiction involved in the present case arises out of the federal statutes in question. Thus, it is totally appropriate to rely on the provisions of the Administrative Procedures Act in seeking judicial review of an agency decision. At the very least the trial court should have granted leave to amend by adding that element to the jurisdictional statement. The failure to recite the fact that 5 U.S.C. §702 grants authority for judicial review of arbitrary administrative actions could not render the plaintiffs without standing to challenge the administrative acts in question.

The Court of Appeals totally ignores the extensive authority for the proposition that a municipality has full standing to challenge the kind of administrative decisions at issue here. It conceded, as it must, the plaintiffs' standing under NEPA. The Court, however, ignored the implications of that standing, by affirming the dismissal on the grounds of inadequate pleading. As we shall demonstrate below, the well pleaded allegations of fact admitted by the motions to dismiss are more than adequate to meet the pleading requirements of the federal rules. Moreover, the Court of Appeals ignored the long list of cases decided by this court, as well as other reviewing courts of appeals recognizing the right of municipalities and private citizens to sue under NEPA. In addition to the cases cited in the Court of Appeals opinion sustaining a private right of action under NEPA, (42 U.S.C. §4332), additional citations include: *California v. Watt*, 683 F.2d 1253; *Friedman Brothers Investment Co. v. Lewis*, 676 F.2d 1317 (9th Cir. 1982); *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975); *Groton v. Laird*, 353 F.Supp. 344 (1972, D.C. Conn.); *Orange Town v. Gorsich*, 544 F.Supp. 105 (1982, S.D. N.Y.); *Ridley v. Blanchett*, 421 F.Supp. 435 (1976 E.D. Pa); *San Francisco v. United States*, 443 F.Supp. 116, *aff'd* 615 F.2d

498 (CA 9) and this Court's opinion in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 57 L.Ed.2d 595, 98 S.Ct. 2620 (1978).

The district court found that the plaintiffs lacked standing under NEPA but the Court of Appeals notwithstanding its finding to the contrary did not reverse this part of the district court's opinion. Instead, the Court of Appeals having recognized standing, treated this matter as if it had been tried and evidence was before the trial court. It states that no environmental impact statement need be prepared where the proposed action will not "significantly" affect the quality of the environment. However, there is absolutely no evidence or counter affidavits asserting, that the action of the defendants will not significantly affect the quality of the environment and, the allegations of the complaint and, the uncontroverted affidavit of Asprooth indicate clearly that there will be significant affect on the quality of the environment.

The Court of Appeals also pointed out that the categorical exclusion upon which UMTA based its refusal to prepare an EIS permits the construction of new bus storage and maintenance facilities "where such construction is not inconsistent with the existing zoning and located on or near a street with adequate capacity to handle anticipated bus and support vehicle traffic." The allegations of the complaint demonstrate clearly that the proposed construction *is* inconsistent with existing zoning and *is not* located on or near a street with adequate capacity to handle anticipated bus and support vehicle traffic.

The Court of Appeals also stated that considering the present steel business, it could not see how the proposed use will not, in fact, be an environmental improvement. However, this is a matter of evidence. The existing business is a long established benign use having little or no impact upon the community. The Court of Appeals without evidence of what the existing environmental conditions

are, makes an assumption that the existing use is not without considerable environmental impact on its own. The court states that ordinarily one would not consider a bus garage to be an environmentally detrimental use. That conclusion is totally unsupported by the record. It is particularly inappropriate in light of the allegations of fact contained in the complaint and in the affidavit which clearly indicate the adverse impact that the proposed use would have on the surrounding area, including the residential development.

The Appeals Court agreed it is not necessary to plead evidence but then based its opinion on speculative evidence of its own manufacture not even suggested by the record. At the pleading stage, it was not up to the trial court to weight the merits which might be developed as a result of a trial. Yet the Court of Appeals' opinion implicitly makes judgments based upon evidentiary matters which were not before it.

It is this characterization of facts which do not appear in the record and could only be developed at the trial on the merits which demonstrates the fallacy of the Court of Appeals' opinion. The question of how or why the bus facility will generate more traffic than the steel business, or that the movement of many buses instead of a few trucks will not impact the community assumes facts which could only be determined on a trial of the cause. We alleged that the pollution, noise, congestion and traffic will have an adverse impact on the surrounding area, different from that which presently exists. That is sufficient to at least give the plaintiffs an opportunity for a trial on the merits.

The court stated that plaintiffs did not suggest why or how the property's use would be inharmonious with the current zoning classification, yet the allegations of the complaint are that the proposed use requires a special use permit under the zoning ordinance of the City of Evanston and is contrary to the comprehensive plan. Those facts alone

which are admitted by the motions to dismiss take the proposed use out of the categorical exclusion. On its face, the complaint demonstrated that the propsed use fell outside the categorical exclusion upon which the court bases its opinion.

The Court of Appeals' opinion also states that the aldermen have not pleaded how they will be adversely affected because of the change in use even if they live across the street and that they have no personal stake in the change in use. This type of requirement is well beyond that voiced by any court in considering challenges under NEPA. See, for example, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 28 L.Ed.2d 136 (1971). This court there held that private citizens as well as local and national conservation organizations had the right to judicial review of the Secretary of Transportation's determination to route a highway through a park. At 401 U.S. 410, this court said:

> "A threshold question – whether petitioners are entitled to any judicial review – is easly answered. Section 701 of the Administrative Procedure Act, 5 USC §701 (1964 ed. Supp V), provides that the action of 'each authority of the Government of the United States,' which includes the Department of Transportation, is subject to judicial review except where there is a statutory prohibition on review or where 'agency action is committed to agency discretion by law.' In this case, there is no indication that Congress sought to prohibit judicial review and there is most certainly no 'showing of "clear and convincing evidence" of . . . legislative intent' to restrict access to judicial review. Abbott Laboratories v. Gardner, 387 US 136, 141, 18 L Ed 2d 681, 687, 87 S Ct 1507 (1967); Brownell v. We Shung, 352 US 180, 185, 1 L Ed 2d 225, 229, 77 S Ct 252 (1956)."

The court went on to hold at 401 U.S. 416 that scrutiny of the facts does not end, however, with a determination that the Secretary had acted within the scope of

his statutory authority. The court said:

> "Section 706 (2) (a) requires a finding that the actual choice made was not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 USC §706 (2) (A) (1964 3d., Supp V). To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Jaffe, supra, at 182. See McBee v. Bomar, 296 F2d 235, 237 (CA6 1961); In re Josephson, 218 F2d 174, 182 (CAL 1954); Western Addition Community Organization v. Weaver, 294 F Supp 433 (ND Cal 1968). See also Wong Wing Hang v. Immigration and Naturalization Serv., 360 F2d 715, 719 (CA2 1966)."

Thus, as here, where there are clear allegations of an abuse of discretion by paying a sum arguably a million dollars in excess of the value of the property, as well as other legal defects which injure the plaintiffs, the court properly has the right and duty to examine the facts.

In a long series of cases involving "injury in fact" and "zone of interest" questions, the courts have upheld the standing of private individuals to challenge the omission or sufficiency of an environmental impact statement under 42 U.S.C. §4332 (2) (C). Among such cases are *Rhode Island Committee on Energy v. General Services Adminisstration*, 397 F.Supp. 41; *Silver v. East Providence Housing Authority*, 390 F. Supp. 691; *Conservation Society of Southern Vermont v. Volpe*, 343 F. Supp. 761, *aff'd* 508 F.2d 927 *Citizens for Clean Air, Inc. v. Corps of Engineers*, 349 F.Supp. 696, *Save the Courthouse Committee v. Lynn*, 408 F.Supp. 1323; *Lake Erie Alliance v. United States Army Corps of Engineers*, 486 F.Supp. 707.

The case of *Schiffler v. Schlessinger*, 548 F.2d 96, held that a resident of a community from which an army signals school was to be moved had satisfied one prong of the test as to standing to bring an action challenging the determi-

nation that an environmental impact statement need not be prepared. The complaint alleged that the action would result in large-scale unemployment and population loss in the community which would produce severe environmental and socio-economic affects on the plaintiff' community's quality of life. The court reasoned that residents in the area satisfied the injury in fact requirement of standing because personally felt aesthetic or conservational harm is sufficient to establish standing. See also, *Sanson Committee v. Lynn*, 366 F.Supp. 12171 and *Havsons, Inc. v. Secretary of Interior*, 519 F.Supp. 434, in which the court held that two private individuals had standing to challenge approval by the Secretary of the Interior of a comprehensive management plan for the conservation and development of the New Jersey Pinelands. The plaintiffs made general allegations as to those interests which they felt entitled them to prosecute the cases. These cases and many more are cited at length in the annotation found in 62 A.L.R. Fed.3d 337.

The individual plaintiffs here thus have standing as aldermen and residents of the ward in which the subject property is located and as the Mayor of the City of Evanston. To accept the appeals court's view that none of the plaintiffs have standing would be to close the door upon any judicial review of federal actions undertaken under statutes which are intended to protect the environment and to preserve the rights of the taxpayers to see that their monies are properly used.

The court further suggests that the plaintifffs did not allege sufficiently how a decline in property values and loss of tax revenues would result from a change in use. The environmental impact described in the complaint obviously suggest the basis for decline in property values and it is specifically alleged that those factors will produce a decline in property values. The fact that the property is to be owned and used by a municipal corporation means that

the property will be taken off the tax rolls. Those facts are sufficiently and definitely alleged in the pleadings and in the Asprooth affidavit. To deny, therefore, that there will be a loss in tax revenues and a decline in property values in light of the allegations of fact indicates the myopic view with which the Appeals Court approached this case. Such a reduction in taxable values directly injures a municipality and gives it standing to challenge the action. *Gladstone Realtors v. Bellwood*, 441 U.S. 91, 60 L.Ed.2d 66, 99 S. Ct. 1601 (1979), at 110.

In *United States v. SCRAP*, 412 U.S. 669, 37 L.Ed.2d 254, 93 S.Ct. 2405, at pages 686 and 687, this Court made clear that "injury in fact", was not confined to those who could show economic harm but that aesthethic and environmental wellbeing, like economic wellbeing, which are shared by the many, rather than just the few does not make them less deserving of legal protection through the judicial process. The aldermen and mayor as plaintiffs have clearly demonstrated an interest which they may share with others but which are clearly sufficient to give them standing under *Barlow v. Collins*, 397 U.S. 159, 25 L.Ed.2d 192, 199 (1970) and *Data Processing Service Organizations v. Camp*, 397 U.S. 150, cited by the appeals court in its opinion as further explained by this court in *SCRAP*.

In the case of *Havens Realtly Corporation v. Coleman*, 455 U.S. 363, 71 L. Ed.2d 214, 102 S.Ct. 1114 (1982), this court agreed with an appellate court decision that it was inappropriate to dismiss the case on the pleadings. The case involved alleged violations of the Fair Housing Act because of steering practices. This court used language at page 377, which is particularly appropriate in the case at bar. It said:

> Nonetheless, in the absence of further factual development, we cannot say as a matter of law that no injury could be proved. Respondents have not identified the particular neighborhoods in which they lived, nor established the proximity

> of their homes to the site of petitioners' alleged steering practices. Further pleading and proof might establish that they lived in areas where petitioners' practices had an appreciable effect. Under the liberal federal pleading standards, we therefore agree with the Court of Appeals that dismissal on the pleadings is inappropriate at this stage of the litigation. At the same time, we note that the extreme generality of the complaint makes it impossible to say that respondents have made factual averments sufficient if true to demonstrate injury in fact. Accordingly, on remand, the District Court should afford the plaintiffs an opportunity to make more definite the allegations of the complaint. Cf. Fed Rule Civ Proc 12(e).

The Appeals Court, as it had to, recognized the plaintiffs had standing under NEPA. It, however, negated this finding by concluding that the pleadings were insufficient to state a cause of action. To reach this erroneous conclusion, the court had to ignore the clear language of the pleadings themselves, and to make evidentiary judgments and draw conclusions which were simply impossible to make without a trial on the merits.

This Court has never directly passed upon the question of a private right of action under the UMTA Act, c.f. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410, 416, 28 L.Ed.2d 1367 (1971). For that reason alone, review is necessitated. The Court of Appeals' opinion reached the conclusion that there was no such right but cited only three other court decisions which are clearly distinguishable. No other circuit court of appeals has apparently passed on the question. It is clear under this Court's decisions in *Barlow v. Collins*, 397 U.S. 159, 25 L.Ed.2d 192 (1970) and *Association of Data Processing v. Camp*, 397 U.S. 150, 25 L.Ed.2d 184 (1970) that preclusion of judicial review of administrative actions should not lightly be inferred. As this Court noted in *Barlow v. Collins*, "indeed, judicial review of such administrative action is the rule, and nonreviewability an

exception which must be demonstrated." There has been no such demonstration of an exception in this case. See also *Bowen* v. *Michigan Academy of Family Physician*, 476 U.S. ___, 90 L.Ed.2d 623 (1986).

This Court's more recent decisions in this area have clearly indicated that at least a municipality has standing to sue under UMTA. The leading case is *Cort v. Ash*, 422 U.S. 66, 45 L.Ed.2d 26 (1975) in which the court laid down its criteria for determining whether a private remedy is implicit in a statute not expressly providing for one. In the subsequent case of *Cannon v. University of Chicago*, 441 U.S. 677, 60 L.Ed.2d 560 (1979), the court further embellished its view. It indicated that the threshold question under *Cort* is whether the statute was enacted for the benefit of a special class of which the plaintiff is a member. Clearly, a municipality is a member of a special class for whose benefit the statute was enacted. Under 49 U.S.C. §1602(b), the applicant must certify that the project is consistent with official plans for the comprehensive development of the urban area. This "consistency" is for the benefit of a municipality, such as Evanston, which has adopted a comprehensive plan. Moreover, the categorical exclusion which is purportedly adopted by UMTA required that such construction not be inconsistent with existing zoning. The entire structure of the UMTA Act indicates the necessity for compliance with local zoning and planning and also indicates the necessity for local official input. Such statutory requirements could not have been imposed absent the intention to include municipalities within the special class for which the statute was enacted.

The second *Cort* test, as indicated in *Cannon*, is the legislative history. In *Cannon*, this court noted that legislative history may be equally silent or ambiguous on the question. But the court noted that it was not necessary to show an intention to create a private cause of action, although an explicit purpose to deny such a cause of action

would be controlling. There, of course, is nothing in the legislative history which indicates any desire to deny a cause of action to a municipality which is clearly within the benefited class, and preclusion is not to be inferred.

The third criteria under *Cort* is that a private remedy should not be implied if it would frustrate the underlying purpose of the legislative scheme. The court stated, however, "on the other hand, when that remedy is necessary or at least helpful to the accomplishment of statutory purpose, the court is decidedly receptive to its implication under the statute." Here, the statute in question is clearly not frustrated by requiring compliance with local planning objectives and giving weight to local officials' determination. In fact, the remedy is necessary and helpful to the accomplishment of the statutory purpose of achieving consistency with local plans.

Finally, the inquiry suggested by *Cort* is whether implying a federal remedy is inappropriate because the subject matter involves an area basically of concern to the States. The situation in the case at bar does not involve such an area. It involves the expenditure of federal funds for a local project and the application of local zoning and planning criteria. See also, *Duke Power Company v. Carolina Environmental Study Group*, 438 U.S. 59, 57 L.Ed.2d 595 (1978).

The question of whether a municipality, such as the City of Evanston is, in fact, exercising a "private remedy" is also open to question. It is acting in the public interest. The intimate involvement of local authorities in the type of project proposed here clearly establishes an interest which is "palpable and direct." The City is suffering an injury "in fact," both in terms of loss of taxable values and environmental impact, as well as a violation of its planning and zoning standards. It clearly has a right to a remedy under UMTA and the mechanical denial of that right by the Court of Appeals should not stand.

Under *Barlow* and *Data Processing*, the criteria for standing to review agency action requires that the challenged action must result in injury in fact to the plaintiff; the interest invaded must be arguably within the zone of interest to be protected by the statute, and there must be no statutory inhibition of judicial review. A fair reading of the complaint demonstrates that the plaintiffs here have met those requriements and the Court of Appeals' view that they lack standing under UMTA is clearly erroneous.

II.

THE ALLEGATIONS OF THE COMPLAINT WERE SUFFICIENT TO STATE A CAUSE OF ACTION IN THE FACE OF THE MOTION TO DISMISS

The Court of Appeals in its opinion totally ignored the requirements of the Administrative Procedures Act. It found no "private remedy" available under UMTA, but conceded standing under NEPA. However, the court then concluded that the allegations of the complaint were insufficient to state a cause of action under NEPA. This erroneous conclusion must be viewed in the light of the repeated holdings of this court with respect to the question of standing and pleading requirements under the Federal Rules.

With respect to the question of standing under the Administrative Procedures Act, we have indicated above that this is not an independent remedy and the failure to include citation of the statute in our original jurisdictional statement is not fatal. It is fundamental that a case will not be dismissed because the complaint seeks one remedy rather than another plainly appropriate one. *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 58 L.Ed.2d 292 (1978) at page 65. We have also demonstrated above that the plaintiffs clearly had standing under UMTA. As this court noted in *Duke Power Company v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 57 L.Ed.2d 595 at page 80:

> "Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met."

Thus, the Court of Appeals erred in denying standing under APA and UMTA. Its dismissal for lack of adequate pleading under NEPA moreover simply cannot stand in light of the wellpleaded facts in the complaint.

In its opinion, the court concedes that the applicant must certify that the project comports with official development plans. The complaint here alleged that it did not. The opinion concedes that affected citizens should participate effectively in local decision making and that the legislative history indicates that Congress was interested in ensuring that local officials consider the local effects of their decisions. These considerations would be meaningless if local officials could not challenge those decisions.

The Court of Appeals in its opinion also indicates that in the case of categorical exclusions, such actions will not induce significant forseeable alterations in land use, planned growth or development patterns. Here, the clear allegations of the complaint show that there will be significant alternations in land use, planned growth and development patterns.

Moreover, contrary to the court's opinion, the allegations of the complaint in fact set forth considerable environmental impact from the proposed use as compared with the existing use. The complaint alleges increased traffic and other adverse environmental consequences which are not insignificant. Moreover, the change in use will clearly affect the tax revenues of the municipality as indicated by the Asprooth affidavit and the allegations of the complaint. We have appended to this petition of copy the complaint. An examination of that complaint clearly indicates

the substantial allegations of fact which must be taken as true on a motion to dismiss and demonstrates conclusively the standing of the parties.

When, as here, the well-pleaded allegations of the complaint which are taken as true, frame an issue, a motion to dismiss is improper where factual and legal disputes need to be resolved. *Los Angeles v. Preferred Communications*, 476 U.S. ___, 90 L.Ed.2d 480, 487 (1986). A court may dismiss a complaint only if it clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Hishon v. King & Spaulding*, 467 U.S. 69, 81 L.Ed.2d 59, 104 S.Ct. 2229 (1984). Moreover, it is not necessary that a complaint specifically refer to jurisdiction if it alleges facts which would clearly support such jurisdiction. *Scheuer v. Rhodes*, 416 U.S. 232, 40 L.Ed.2d 90, 94 S.Ct. 1683, 235 (footnote 1) (1974).

In the seminal case of *Conley v. Gibson*, 355 U.S. 41, 2 L.Ed.2d 80 (1957), this Court set forth the basic rules with respect to pleading requirements under the federal rules. At page 45, the court said:

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

At page 47, the Court continued:

> The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

The Court concluded at page 48:

> Following the simple guide of Rule 8 (f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. Cf. Maty v. Grasselli Chemical Co. 303 US 197, 82 L ed 745, 58 S Ct 507.

Conley v. Gibson was cited with approval in *United States v. Hougham*, 364 U.S. 310, 5 L.Ed.2d 8 (1960), *Foman v. Davis*, 371 U.S. 178, 9 L.Ed.2d 222 (1962) and many subsequent decisions. In the *Foman* case, the court at 181 said:

> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." Conley v. Gibson, 355 US 41, 48, 2 L ed 2d 80, 86, 78 S Ct 99. The Rules themselves provide that they are to be construed "to secure the just, speedy, and inexpensive determination of every action." Rule 1.

We respectfully suggest that the allegations of the complaint clearly set forth a cause of action and the arbitrary dismissal by the district court was an abuse of discretion. The Court of Appeals totally ignored the substantial allegations of fact which clearly presented a case in controversy under UMTA and NEPA, as well as APA. The allegations of the complaint were more than adequate to state a cause of action. To summarily dismiss this impor-

tant case without giving plaintiffs an opportunity to amend or to prove the clear allegations of the complaint requires a reversal by this court in order to protect the rights not only of these plaintiffs but municipalities, municipal officials and the public throughout the country. This decision cannot be allowed to stand.

CONCLUSION

This court should grant the writ of certiorari because the opinion of the Court of Appeals is clearly contrary to this Court's repeated series of holdings commencing with *Conley v. Gibson,* and culminating in *Los Angeles* and *Hishon.* The opinion totally ignores the basic rules of federal pleading and the restraints on dismissal based on the pleading. It denies to these public and private plaintiffs an opportunity to prove their meritorious claims against an arbitrary abuse of discretion on the part of a major federal agency.

The decision with respect to a private right of action under the UMT Act is contrary to this Court's views in *Barlow v. Collins, Association of Data Processing, Cort v. Ash, Cannon v. University of Chicago.* and *Merrill Lynch, Pierce, Fenner & Smith v. Curran.* It removes the right of local municipalities and their elected officials to protect the public health and safety, the local tax base and the character of the environment, from arbitrary federal actions which are made immune from judicial review. The Court of Appeals' opinion affirmed a dismissal on the pleadings by refusing to find a right of action under the Administrative Procedures Act or the UMT Act, while effectively denying such a right of action, under NEPA. Contrary to the repeated decisions of this Court, that summary action denied the opportunity to present evidence on the question of local impact of a major federal project.

The Court of Appeals misreads this Court's opinions with respect to the right of standing, to effectively preclude those persons and local governments most intimately

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 86-2113

CITY OF EVANSTON, a municipal corporation, JOAN W. BARR, ANN RAINEY and NORRIS LARSON,

Plaintiffs-Appellants,

v.

REGIONAL TRANSPORTATION AUTHORITY, a municipal corporation, et al.

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 3963–James F. Holderman, *Judge.*

ARGUED December 1, 1986 –
DECIDED July 10, 1987*

Before BAUER, *Chief Judge,* WOOD, JR., *Circuit Judge,* and PELL, *Senior Circuit Judge.*

PER CURIAM. The City of Evanston, its mayor, and two aldermen brought suit seeking injunctive and declaratory relief in order to block the funding, purchase, and use

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* This opinion is released in typescript form, but a printed opinion will follow at a later date.

of property at 2424 Oakton Street in Evanston, Illinois, as a bus maintenance facility. The defendants to the suit are the Regional Transportation Authority ("RTA"), the Suburban bus Division of the RTA (known as "PACE"), the National Steel Service Center Inc. ("National"), and the Urban Mass Transit Administration ("UMTA"), an agency of defendant United States Department of Transportation ("DOT"). The property in question was previously owned by National, and used as a manufacturing facility. The RTA received a federal grant from UMTA for the purpose of acquiring the property.

The district court on June 27, 1986, granted the defendants' motions to dismiss the complaint, finding that the plaintiffs had failed to allege the requisite standing to invoke the district court's jurisdiction. The plaintiffs appealed, arguing that the dismissal was improper.

Because this is an appeal of a granted motion to dismiss, the allegations of fact in the complaint are taken to be true. *Doe v. St. Joseph's Hospital*, 788 F.2d 411, 414 (7th Cir. 1986); *Ellsworth v. City of Racine*, 774 F.2d 182, 184 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1265 (1986). These facts, however, will be discussed only as they are necessary to the discussion of the issues.

I. JURISDICTIONAL ISSUES

The plaintiffs claimed in their complaint that the district court had federal question jurisdiction under 28 U.S.C. §§ 1331, 2201, based on the Urban Mass Transportation Systems Act, 49 U.S.C. § 1601 *et seq.* ("UMT Act") and the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA"). Additionally, in opposition to defendants; motions to dismiss and on appeal, the plaintiffs alleged jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 702.

The district court, addressing only those bases of jurisdiction that appeared on the face of the plaintiffs' com-

plaint, found that the plaintiffs lacked standing to bring suit under the UMT Act or NEPA because neither statute created a private right of action. Moreover, the district court ruled that the individual plaintiffs had no standing to sue as taxpayers because the disputed decision was not an exercise of congressional power but was made by the executive branch.

The plaintiffs argue that the allegations of their complaint, if taken as true, establish that the plaintiffs have standing to challenge the use of federal funds to install a facility which they believe is highly detrimental to the environment and health and safety of the city and its citizens.

Article III of the Constitution restricts the power of the federal judiciary to the resolution of "cases" and "controversies." *Diamond v. Charles*, 106 S. Ct. 1697, 1703 (1986); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982); *Flast v. Cohen*, 392 U.S. 83, 94-101 (1968); *see also Northside Sanitary Landfill v. Thomas*, 804 F.2d 371, 380-81 (7th Cir. 1986). The concept of a party's standing to bring suit "is a component of the case-or-controversy requirement and, as such, bears on the power of a court to entertain a party's claim." *Id.* at 380-81; *Valley Forge*, 464 U.S. at 471.

In order for a party to have standing to bring suit in federal court, three requirements must be met: (1) the party must personally have suffered an actual or threatened injury caused by the defendant's allegedly illegal conduct, (2) the injury must be fairly traceable to the defendant's challenged conduct, and (3) the injury must be one that is likely to be redressed through a favorable decision. *Valley Forge*, 454 U.S. at 472. "Neither the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III." *Id.* at 487-88 n.24.

Beyond the constitutional requirements, the

> federal judiciary has also adhered to a set of prudential principles that bear on the question of standing. Thus, this Court has held that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interest of third parties." *Warth v. Seldin*, 422 U.S. [490,] 499 [1975]. In addition, even when the plaintiff has alleged redressable injury sufficient to meet the requirements of Art. III, the Court has refrained from adjudicating "abstract questions of wide public significance" which amount to "generalized grievances," pervasively shared and most appropriately addressed in the representative branches. *Id.*, at 499-500. Finally, the Court has required that the plaintiff's complaint fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 153 (1970).

Valley Forge, 454 U.S. at 474-75 (footnotes omitted).

A. Standing Under the UMT Act.

The UMT Act does not create a private right of action, and none can be implied.

In determining whether a private right of action can be implied, a court must look to the intentions of Congress in enacting the statute. *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 377-78 (1982); *Cort v. Ash*, 422 U.S. 66, 78 (1975). If the language of the statute and its legislative history do not indicate that the statute was intended to benefit a particular class of persons, then the court need not consider other factors. *California v. Sierra Club*, 451 U.S. 287, 297-98 (1981).

> The Supreme Court has drawn a distinction between statutes whose language focuses on a right granted to a benefitted class of persons – where a private cause of action is generally found – and statutes framed as a "general prohibition or command to a federal agency" – where a cause of

action is seldom implied.

Rapid Transit Advocates v. Southern California Rapid Transit District, 752 F.2d 373, 376 (9th Cir. 1985). *Compare Universities Research Association v. Coutu*, 450 U.S. 754 (1981) (no private right of action under Davis-Bacon Act) *with Cannon v. University of Chicago*, 441 U.S. 677 (1979) (Court found private right implied by Title IX of the Education Amendments of 1972).

Several courts that have considered the issue concluded that:

> [n]either the language nor the legislative history of the UMT Act suggests that the Act was intended to create federal rights for especial benefit of a class of persons but rather was intended to benefit the public at large through a general regulatory scheme to be administered by the Secretary of Transportation.

Lloyd v. Illinois Regional Transportation Authority, 548 F. Supp.575, 586 (N.D. Ill. 1982); *see also Rapid Transit Advocates*, 752 F.2d at 377; *Associated Businesses of Franklin v. Warren County Board*, 522 F. Supp. 1015, 1018-20 (S.D. Ohio 1981); *Dopico v. Goldschmidt*, 518 F. Supp. 1161, 1172-73 (S.D. N.Y. 1981), *aff'd in part, rev'd in part*, 687 F.2d 644 (2d Cir. 1982). We agree with these courts.

Section 1602(d) of the UMT Act requires that an applicant for a federal grant or loan shall certify that it has provided notice and an opportunity for public hearings and had held such hearings, "unless no one with a significant economic, social, or environmental interest in the matter requests a hearing." 49 U.S.C. § 1602(d)(1). Additionally, the applicant must certify that it has considered the economic, social, and environmental impacts of the project and has found that the project comports with official development plans. 49 U.S.C. § 1602(d)(2), (3). This language does not create rights for a benefitted class of persons; it simply outlines information that an applicant must supply to the

Secretary of Transportation as a condition to receiving a grant or loan. The committee report on § 1602(d) supports this interpretation. The committee noted that it "believe[d] that major federally assisted projects in urban areas should reflect full consideration of social and environmental, as well as economic, effects, and that affected citizens should participate effectively in local decision-making." H.R.Rep. No. 1264, 91st Cong., 2d Sess. *reprinted in*, 1970 U.S. Code Cong. & Admin. News 1122, 4097. However, the committee was concerned that "in many instances a public hearing would serve merely to delay proposed projects, which are already time consuming because of the numerous local and Federal actions involved in carrying out complex projects." *Id.* The committee suggested that the DOT should "exercise special care in framing regulations which carry out the intent of this requirement without unduly burdening local officials." *Id.* This legislative history indicates that Congress was interested in ensuring that local officials consider the local effects of their decisions, but not at the expense of delaying projects unduly.

Neither the statutory language itself nor the committee report offers support for the plaintiffs' right to sue under the statute. Therefore, the plaintiffs cannot proceed under the UMT Act.

B. Standing Under NEPA.

Several courts, including the United States Supreme Court, have held or simply assumed that NEPA, 42 U.S.C. § 4432, does create a private right of action. *See, e.g., Unites States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973); *Port of Astoria v. Hodel*, 595 F.2d 467 (9th Cir. 1979); *Realty Income Trust v. Eckerd*, 564 F.2d 447 (D.C. Cir. 1977); *Robinson v. Knebel*, 550 F.2d 422 (8th Cir. 1977); *City of Rochester v. United States Postal Service*, 541 F.2d 967 (2d Cir. 1976). In these cases, the plaintiffs successfully sought to require the defendants to take a "hard look,"

through the preparation of an environmental impact statement ("EIS"), at the environmental consequences of their proposed actions. Plaintiffs here seek the same result.

In accordance with NEPA, 42 U.S.C. § 4332(2)(C), all agencies of the federal government shall "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" a detailed statement (the EIS) concerning the environmental impact of the proposed action and related matters. As we have previously held, however, no EIS need be prepared where the proposed action will not *significantly* affect the quality of the environment. *River Road Alliance v. Corps of Engineers*, 764 F.2d 445, 449 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1283 (1986); *City of West Chicago v. United States Nuclear Regulatory Commission*, 701 F.2d 632, 647-48 (7th Cir. 1983).

The Council on Environmental Quality ("CEQ"), established by Title II of NEPA, 42 U.S.C. §§ 4341-4347, has promulgated regulations governing agency compliance with NEPA. The CEQ has established uniform procedures for all federal agencies to use in determining whether, when, and how to prepare an EIS. 40 C.F.R. § 1500-1517. Additionally, federal agencies are directed to adopt their own supplemental procedures as necessary. 40 C.F.R. § 1507.3(a) (1978). In response to this directive, UMTA and the Federal Highway Administration ("FHWA") have promulgated regulations at 23 C.F.R. § 771.101-.137 and 49 C.F.R. § 662.101 to implement NEPA and the CEQ procedures.

The CEQ requires that the agencies adopt specific criteria for and identification of three classes of agency action. 40 C.F.R. § 1507.3(b) (1978). Class I projects include actions that may significantly affect the environment and thus require an EIS. Class II projects, termed "categorical exclusions," include actions which normally do not have a

significant effect on the environment and thus would not require an EIS or environmental assessment[1] Class III projects are those in which the environmental impact cannot be initially determined. For Class III projects, the agencies must prepare an environmental assessment to determine whether an EIS is required.

Consistent with the CEQ's classification procedures, the UMTA/FHWA regulations enumerate twenty-nine categorical exclusions. 23 C.F.R. § 771.115(b)(1)-.115(b)(29) (1986). Categorical exclusions are defined as "categories of actions which do not involve significant environmental impacts or substantial planning, time or resources. These actions will not induce significant foreseeable alterations in land use, planned growth, development patterns, or natural or cultural resources." 23 C.F.R. § 771.117(a) (1980). The categorical exclusion most applicable to his controversy reads as follows:

> Construction of new bus storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and located on or near a street with adequate capacity to handle anticipated bus and support vehicle traffic.

23 C.F.R. § 771.115(b)(25) (1986).

The plaintiffs allege in their complaint that the City of Evanston has requested UMTA to undertake an environmental study and provide an EIS. According to the complaint, UMTA has refused to do so, because it considers the project to be a "categorical exclusion" from NEPA's requirement that the agency prepare an EIS. The plaintiffs

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[1] An "environmental assessment" is a concise public document prepared by the agency which provides, among other things, the evidence and analysis the agency used in determining whether an action will have a significant impact and therefore require an EIS. 40 C.F.R. § 1508.9 (1978).

assert that UMTA made the wrong decision, that the proposed bus garage is not properly excludable from the EIS requirement.

The complaint alleges that the property at 2424 Oakton Street is currently used as a steel business and is zoned for the M-4 Manufacturing District. The complaint also alleges that the use of property as a bus garage is not consistent with the comprehensive plans for the area and requires a special use permit.[2]

The complaint on its face creates a problem in these particular circumstances. Considering the present steel business use in light of nothing but some vague and general allegations of environmental harms, we cannot see why or how the new proposed use will not in fact be an environmental improvement. This case does not arise in a vacuum. The property is not a vacant lot. The existing use, a steel business, is not without considerable environmental impact of its own. In these circumstances the plaintiffs' complaint must clearly articulate a "distince and palpable" injury in fact, within the zone of interests which NEPA protects, that will result from the property's conversion from a steel manufacturing business, not ordinarily considered an environmental benefit, to a bus garage. *See Warth v. Seldin*, 422 U.S. at 501 (1975). Ordinarily, one would not consider a bus garage, in the typical location, to be environmentally detrimental, and UMTA/FHWA regulations therefore categorically exclude bus garages from the EIS requirement of NEPA. The Plaintiffs do not suggest how or why the bus garage will generate more traffic than the going steel business, or that the character of the

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[2] The Agreement of Sale, attached to the complaint as Exhibit B, indicates that during the course of negotiations leading to the agreement the City of Evanston amended its zoning ordinance to change the use of the property as a bus garage from a permitted use to a special use.

traffic, buses instead of trucks, will have some significant impact.The plaintiffs do not suggest how or why pollution, noise, or other supposed adverse environmental impacts will be increased by reason of the change from a steel business to a bus garage. It is, of course, not necessary to plead evidence, but in these particular circumstances the plaintiffs must provide some suggestions that this change causes particular and specific adverse environmental consequences affecting these plaintiffs.

The plaintiffs must demonstrate "that their environmental concerns are not so insignificant that they ought to be disregarded altogether." *Robinson v. Knebel*, 550 F.2d 422, 425 (8th Cir. 1977).

As far as we can tell, the current use of the property as a steel manufacturing business has been acceptable to the plaintiffs. They have not claimed that the steel business is a nonconforming use. They do not suggest why or how the property's use as a bus garage would be inharmonious with the current zoning classification, M-4 Manufacturing, regardless of how the zoning ordinance has been manipulated during this controversy. The plaintiffs do not suggest any reason why the the categorical exclusion should not apply.

The two alderman plaintiffs do not sufficiently allege where they live in relation to the property. Moreover, they have failed to allege in a concrete or particular way how they will be adversely affected because of the change in use, even if they live across the street. *See City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975) (plaintiff must have "a sufficient geographical nexus to the site of the challenged project"). They have demonstrated no personal stake in the change of use. *Warth v. Seldin*, 422 U.S. at 501; *Barlow v. Collins*, 397 U.S. 159, 164-65 (1970); *Data Processing Service Organizations v. Camp*, 397 U.S. 150, 152-57 (1970).

Nor do the City and its mayor allege specifically in a

concrete and particularized way how the bus garage use will be more detrimental than the steel business. They do not allege sufficiently how some conjectured decline in property values and loss of tax revenues, even if considered to be within the zone of protected interests, will result from the change of use. The complaint is framed in general boilerplate language which demonstrates no specific relation of these plaintiffs to this piece of property. Standing is not conferred under NEPA merely because plaintiffs generally disfavor a proposed use of a particular piece of property, if they do not allege some distinct injury in fact to their environmental interests. *See Glass Packaging Institute v. Regan*, 737 F.2d 1083, 1091 (D.C. Cir.), *cert. denied*, 469 U.S. 1035 (1984). Plaintiffs have not sufficiently demonstrated that they have standing under NEPA.

C. Taxpayer Standing.

Plaintiffs lack taxpayer standing. Taxpayer standing is limited to challenges directed at congressional actions. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 479 (1982); *Schlesinger v.f Reservists Committee to Stop the War*, 418 U.S. 208, 228 (1974); *Flast v. Cohen*, 392 U.S. 83, 102 (1968). The plaintiffs challenge is to the use of federal funds provided to the RTA by UMTA. This grant of federal funds is an action undertaken by the executive branch, involving no congressional action.

II. CONCLUSION

The plaintiffs cannot bring suit under the UMT Act because it created no private right of action and none is implied. The plaintiffs have failed to demonstrate sufficiently that they have standing under NEPA. The plaintiffs have no standing as taxpayers to challenge an action by the executive branch. Therefore, the district court's order dismissing the plaintiffs' complaint is affirmed.

Minute Order Form
(rev. 2/85e)

APPENDIX B

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge	JAMES F. HOLDERMAN	Sitting Judge if Other Than Assigned Judge	
Case Number	86 C 3963	Date	June 27, 1986
Case Title	City of Evanston v RTA, et al		

MOTION: (In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented.)

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) [X] Judgment is entered as follows: (2) [ ] [Other docket entry:]

Ruling date of July 1, 1986 is stricken. Defendants' motions to dismiss are GRANTED. Plaintiffs have failed to allege the requisite standing to invoke this Court's jurisdiction.

(3) [ ] Filed motion of [use listing in "MOTION" box above].
(4) [ ] Brief in support of motion due ____.
(5) [ ] Answer brief to motion due ____. Reply to answer brief due ____.
(6) [ ] Hearing / [ ] Ruling on ____ set for ____ at ____.
(7) [ ] Status hearing [ ] held [ ] continued to [ ] set for [ ] re-set for ____ at ____.
(8) [ ] Pretrial conference [ ] held [ ] continued to [ ] set for [ ] re-set for ____ at ____.
(9) [ ] Trial [ ] set for [ ] re-set for ____ at ____.
(10) [ ] [ ] Bench trial [ ] Jury trial [ ] Hearing held and continued to ____ at ____.
(11) [ ] This case is dismissed [ ] without [ ] with prejudice and without costs [ ] by agreement [ ] pursuant to
[ ] FRCP 4(j) (failure to serve) [ ] General Rule 21 (want of prosecution) [ ] FRCP 41(a)(1) [ ] FRCP 41(a)(2).
(12) [X] [For further detail see [X] order on the reverse of [ ] order attached to the original minute order form.]

	No notices required.			number of notices
X	Notices mailed by judge's staff.		5	
	Notified counsel by telephone.		6-27-86	date typed envelopes
	Docketing to mail notices.			date docketed
X	Mail CIV-31 form.			
KB	courtroom deputy's initials		6-27-86	date mld. notices
		Date/time received in central Clerk's Office	KB	mailing dpty. initials

Document #

(Reserved for use by the Court)

ORDER

86 C 3963

Plaintiffs alleged invocation of jurisdiction under 28 USC Sections 1331 and 2201 fails because 42 USC Sections 4332 and 49 USC Section 1602(d), the federal statutes upon which plaintiffs' allegations are based, do not create a private right of action and none is implied. See Rapid Transit Advocates v. Southern California Rapid Transit District, 752 F.2d 373 (9th Cir. 1985); Lloyd v. Illinois RTA, 548 F.Supp. 575, 586 (N.D. Ill. 1982). Furthermore, plaintiffs lack the requisite personal stake in the outcome. Plaintiffs have failed to allege the requisite standing of injury in fact to interests sought to be protected such as property or environmental interests as required in Data Processing Service v. Camp, 397 U.S. 150, 152-53 (1970). Their complaint fails to allege interests that differ from the public at large. The complaint fails to sufficiently allege an injury that is "distinct & palatable, concrete and immediate," Rapid Transit Advocates, supra 752 F.2d at 378, or an injury of an environmental nature as opposed to pecuniary loss. See Port of Astoria v. Hotel, 595 f.2d 467, 474 (9th Cir. 1979). Even assuming the proximity of the plaintiffs to the site of the proposed bus maintenance facility there is no allegation as to how that facility is more injurious to the plaintiffs than any other allowable industrial or commercial use at that site.

Plaintiffs lack "taxpayer" standing which is limited strictly to challenging the exercise of congressional power as opposed to the situation here which is a decision by the executive branch. See Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 479 (1982); Flast v Cohen, 392 U.S. 83, 102 (1968); Rapid Transit Advocates, supra 752 F.2d at 379.

Plaintiffs allegation of jurisdiction under 28 USC Section 1332 is frivolous. There is no diversity of citizenship among the parties.

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE NOTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 86-2113

CITY OF EVANSTON, a municipal corporation, JOAN W. BARR, ANN RAINEY and NORRIS LARSON,

Plaintiffs-Appellants,

v.

REGIONAL TRANSPORTATION AUTHORITY, a municipal corporation, et al.

Defendants-Appellees.

COMPLAINT

The plaintiffs, CITY OF EVANSTON, JOAN W. BARR, ANN RAINEY and NORRIS LARSON, by JACK M. SIEGEL, their attorney, bring this action to obtain declaratory and preliminary and permanent injunctive relief against any federal financial assistance by the URBAN MASS TRANSPORTATION ADMINISTRATION of the United States Department of Transportation, and the REGIONAL TRANSPORTATION AUTHORITY, an Illinois municipal corporation, for the construction and operation of a bus maintenance facility in the City of Evanston, Illinois and further to enjoin the consummation of an alleged contract between the SUBURBAN BUS DIVISION OF THE REGIONAL TRANSPORTATION AUTHORITY and the NATIONAL STEEL SERVICE CENTER, INC. by which NATIONAL STEEL SERVICE CENTER, INC. would convey certain property in the City of Evanston

to the SUBURBAN BUS DIVISION OF THE REGIONAL TRANSPORTATION AUTHORITY. In support of their complaint, the plaintiffs allege as follows:

JURISDICTION AND PARTIES

1. The plaintiffs' action arises under the Urban Mass Transportation Assistant Act of 1970, 49 U.S.C. § 1601 *et seq.*, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.*, 28 U.S.C. § 1331, § 1332 and 28 U.S.C. § 2201.

2. The plaintiff, CITY OF EVANSTON, is a municipal corporation, located in Cook County, Illinois. It is a home rule city, enjoying those powers delegated to it by the Constitution of the State of Illinois and the Statutes of the Illinois General Assembly. That among the powers enjoyed by the plaintiff, CITY OF EVANSTON, is the power to promulgate and enforce zoning ordinances, traffice control, comprehensive planning ordinances and other ordinances and regulations necessary for the protection of the public health, safety and welfare of its citizens.

3. That the plaintiff JOAN W. BARR, is the Mayor and Chief Executive Officer of the City of Evanston, possessing all powers and duties imposed upon the office of the Mayor by the Constitution and laws of the State of Illinois. That plaintiff JOAN W. BARR is a resident and taxpayer of the City of Evanston.

4. That the plaintiff ANN RAINEY is a resident and taxpayer of the CITY OF EVANSTON. That said plaintiff is also a duly elected alderman of the City of Evanston representing the ward in which the subject property of this litigation, to-wit, 2424 Oakton Street, Evanston, Illinois, is located.

5. That the plaintiff, NORRIS LARSON, is a resident and taxpayer of the City of Evanston and a duly elected alderman of the City of Evanston from the ward in which the subject matter of this lawsuit, to-wit: 2424 Oakton

Street, Evanston, Illinois, is located.

6. That the defendant REGIONAL TRANSPORTATION AUTHORITY is a municipal corporation organized and operating pursuant to the provisions of § 701.1 *et seq.* of Chapter 111-2/3 of the Illinois Revised Statutes. That said Regional Transportation Authority is organized for the purpose of providing for aid and assistance for public transportation in the northeastern area of the State of Illinois. That as a municipal corporation, it exercises only those powers and duties specifically delegated to it by the General Assembly of the State of Illinois.

7. That the defendant SUBURBAN BUS DIVISION OF THE REGIONAL TRANSPORTATION AUTHORITY ("PACE"), is a division established within the Authority pursuant to § 703 A.01 *et seg.* of Chapter 111-2/3 of the Illinois Revised Statutes. That said PACE is the operating division responsible for providing public transportation by bus within the area of the Regional Transportation Authority jurisdiction. That the City of Evanston and the subject property at 2424 Oakton Street, are located within the territorial jurisdiction of the defendant, Regional Transportation Authority ("RTA") and PACE.

8. That the defendant URBAN MASS TRANSPORTATION ADMINISTRATION of the defendant UNITED STATES DEPARTMENT OF TRANSPORTATION is established pursuant to the provisions of the Urban Mass Transportation Act (49 U.S.C. § 1601 *et seq.*) and is commonly known as UMTA.

9. That the defendant PACE purports to be a contract purchaser of certain property hereinafter legally described, by virtue of an alleged agreement of sale dated the fifth day of May, 1986, by and between NATIONAL STEEL SERVICE CENTER, INC. and SUBURBAN BUS DIVISION OF THE REGIONAL TRANSPORTATION AUTHORITY.

10 That the defendant NATIONAL STEEL SERVICE

CENTER, INC., a corporation organized and existing under the laws of the State of New Jersey is the owner of the real property legally described as:

Parcel I: The west 425 feet of the north west quarter of the north west quarter of section 25, township 41 north, range 13 east of the third principal meridian, the said 425 feet being measured at right angles to the west line of said section 25, (excepting from the foregoing described tract, the following parts or parcels thereof: (1) the west 50 feet thereof; (2) that part of said tract lying south of a line drawn parallel to and 1056.86 feet south of the north line of said section 25 (measured at right angles to the north line of said section), (3) that part of said tract lying north of a line 611.00 feet south of the north west corner of said north west quarter, said line being drawn at right angles to the west line of said north west quarter);

Parcel II: That part of the west 425 feet of the north west quarter of the north west quarter of section 25, township 41 north, range 13 east of the third principal meridian, the said 425 feet being measured at right angles to the west line of said section 25, lying south of a line drawn parallel to and 1056.85 feet south of the north line of said section 25, measured at right angles to the north line of said section, (excepting from said described tract the west 50 feet thereof and that part thereof conveyed to the Chicago, North Shore and Northern Railroad, a Corporation of Illinois, for railroad purposes by deed dated June 25, 1924 and recorded September 4, 1924 as document 8575998 and falling within premises described as follows: beginning at a point in the south line of said north west quarter of the north west quarter of said section 25, distant 66.08 feet east, measured along said south line from its intersection with the west line of said section 25: thence east of said south line of the

north west quarter of the north west quarter of section 25, 1212.12 feet to an intersection with the east line of said north west quarter of the north west quarter of said section 25; thence north on said east line of the north west quarter of the north west quarter of said section 25, 5 feet to a point; thence northwesterly on a straight line making an angle to the left with the last described course at the last described point of 92 degrees 15 minutes and 6 seconds, 675 feet to a point distant 10 feet northwesterly measured at right angles from said south line of the north west quarter of the north west quarter of said section 25; thence northwesterly on a straight line making an angle to the right with the last described course at the last described corcse at the last described point of 2 degrees, 53 minutes and 51 seconds, 397.21 feet to a point; thence southwesterly on a straight line making an angle to the left with the last described point of 89 degrees, 56 minutes and 31 seconds, 5 feet to a point; thence northwesterly at right angles to the last described course 139 feet to a point; thence south parallel with the west line of said section 25, 36.27 feet to the place of beginning.)

Parcel III: The west 590 feet, measured at right angles to the west line of section 25, of the north west quarter of the north west quarter of section 25, township 41 north, range 13 east of the third principal meridian, (excepting therefrom: (1) the west 425 feet thereof, measured at right angles to the west line of said section 25, (2) the west 550 feet lying north of a line 611 feet south of the north west corner of said north west quarter, said line being drawn at right angles to the west line of said north west quarter, (3) the north 47 feet thereof lying in Oakton Street, (4) that part thereof included in the following description: beginning at a point in the south line of said north west quarter of the north west quarter of said section

25, distant 66.08 feet east, measured along said south line, from its intersection with the west line of said section 25; thence east on said south line of the north west quarter of the north west quarter of said intersection 25, 1212.12 feet to an intersection with the east line of the said north west quarter of the north west quarter of said section 25; thence north on said east line of the north west quarter of the north west quarter of section 25; 5 feet to a point; thence north westerly on a straight line making an angle to the left with the last described course at the last described point of 92 degrees 15 minutes and 6 seconds, 675 feet to a point distant 10 feet northerly, measured at right angles from the said south line of the north west quarter of the north west quarter of section 25; thence northwesterly on a straight line making an angle to the right with the last described point of 2 degrees, 53 minutes and 51 seconds, 397.21 feet to a point; thence southwesterly on a straight line making an angle to the left with the last described course at the last described point of 89 degrees 56 minutes 31 seconds, 5 feet to a point; thence northwesterly at right angles to the last described course 139 feet to a point; thence south parallel with the west line of said section 25, 36.27 feet to the place of beginning being premises conveyed to Chicago North Shore and Northern Railroad Company by deed recorded as document 8575998, and (5) that part thereof described as follows: beginning at the point of intersection of the south line of Oakton Street with a line drawn parallel to and 425 feet east of the west line of said section 25 (said 425 feet being measured at right angles to said west line of said section 25; thence south along said line 425 feet east of and parallel with the west line of said section 25, a distance of 150 feet; thence east along a line parallel with the south line of Oakton Street a distance of 650 feet; thence north along a line parallel with the west line of said section 25 a distance of 150

to the south line of Oakton Street; thence west along the south line of Oakton Street a distance of 650 feet to the place of beginning;

Parcel IV: The west 425 feet, measured at right angle to the west line of section 25, of the north west quarter of the north west quarter of section 25, township 41 north, range 13 east of the third principal meridian, (excepting therefrom: (1) the west 425 feet thereof measured at right angles to the west line of said section 25, (2) that part of said tract lying north of a line 611 feet south of the north west corner of said north west quarter, said line being drawn at right angles to the west line of said north west quarter; (3) that part thereof included in the following description: beginning at a point in the south line of said north west quarter of the north west quarter of said section 25, distant 66.08 feet east, measured along said south line, from its intersection with the west line of said section 25; thence east on said south line of the north west quarter of the north west quarter of said section 25, 1212.12 feet to an intersection with the east line of the said north west quarter of the north west quarter of said section 25; thence north on said east line of the north west quarter of the north west quarter of section 25; 5 feet to a point; thence northwesterly on a straight line making an angle to the left with the last described course at the last described point at 92 degrees 15 minutes and 6 seconds, 675 feet to a point distant 10 feet northwesterly measured at right angles from the said south line of the north west quarter of the north west quarter of section 25; thence northwesterly on a straight line making an angle to the right with the last described point at the last described point of 2 degrees, 53 minutes and 51 seconds, 397.21 feet to a point; thence southwesterly on a straight line making an angle to the left with the last described course at the last described point of 89 degrees 56 min-

utes 31 seconds, 5 feet to a point; thence northwesterly at right angles to the last described course 139 feet to a point; thence south parallel with the west line of said section 25, 36.27 feet to the place of beginning being premises conveyed to Chicago, North Shore and Northern Railroad Company by deed recorded as document 8575998);

Parcel V: The west 50 feet, measured at right angles to the west line of section 25, of the north west quarter of the north west quarter of section 25, township 41 north, range 13 east of the third principal meridian, lying south of a line 611.00 feet south of the north west corner of said north west quarter, said line being drawn at right angles to the west line of said north west quarter;

Parcel VI: The east 40.05 feet of the west 165.21 feet of lots 1 and 2, all taken as a tract, in William B. Johnson's Subdivision being a Subdivision in the north west quarter of the north west quarter of Section 25, township 41 north, range 13 east of the third principal meridian, all in Cook County, Illinois.

which property is commonly known as 2424 Oakton Street, Evanston, Illinois. Said property contains approximately 9 and 7/10 acres of land together with a building located thereon occupying 58,000 square feet, situated in the City of Evanston, County of Cook and State of Illinois.

11. That all the plaintiffs herein reside within the jurisdiction of this court.

12. That this court has original jurisdiction over this action pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1332, since it is an action arising under the laws of the United States and is an action where the matter in controversy exceeds the sum or value of $10,000 and is between citizens of different states.

THE FACTUAL BACKGROUND

13. The defendant NATIONAL STEEL SERVICE CENTER, INC. is the owner of the above-described real estate located at 2424 Oakton Street, Evanston, Illinois, which property is currently utilized as a steel business. That said property is zoned for the M-4 Manufacturing District under the Zoning Ordinance of the City of Evanston. That pursuant to the Zoning Ordinance of the City of Evanston, the use of said property for a bus garage maintenance and service and inspection facility requires a special use permit under the Zoning Ordinance of the City of Evanston.

14. That the defendant PACE has heretofore applied to the United States Department of Transportation, URBAN MASS TRANSPORTATION ADMINISTRATION, for a grant for the purpose of acquiring the property hereinabove described from its owner for the purpose of utilizing the land and building for a bus garage facility. That said application was made pursuant to the provisions of the Urban Mass Transportation Act. That this facility would allegedly be operated by NORTRAN, a transportation provider in the north and northwest suburbs under contract with PACE.

15. That the grant to PACE from UMTA is provided subject to the provisions of the Urban Mass Transportation Act. That under the provisions of said Act and particularly, 49 U.S.C. §1602, no application for a grant to finance the acquisition, construction, reconstruction of improvement of facilities or equipment which substantially affect the community shall be granted without notice and public hearings. Said notice is to be published in a newspaper of general circulation in the geographic area to be served. Any such application shall include a certification that the applicant has afforded adequate opportunity for public hearings pursuant to adequate prior notice, "has considered the economic and social effects of the project and its impact on the

environment;" and "has found that the project is consistent with official plans for the comprehensive development of the urban area." 49 U.S.C. §1602(d).

16. That notwithstanding said requirements of said section 49 U.S.C. §1602(d), the purported notice was not given directly to the City of Evanston but was instead allegedly published in the Chicago Defender and the Chicago Sun-Times. That no certification has been made that the applicant has considered the economic and social effects of the project or its impact upon the environment and has found that the project is consistent with official plans for the comprehensive development of the urban area. That, in fact, said project is not consistent with official plans for the comprehensive development of the urban area and no environmental impact study has been made.

That the City of Evanston has heretofore requested UMTA to provide the environmental impact study and statement but UMTA has taken the position that this project is a "categorical exclusion," because it constitutes the construction of new bus storage and maintenance facilities "in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and located on or near a street with adequate capacity to handle anticipated bus and support vehicle traffic."

That, in fact, the facility is located in an area without adequate capacity to handle anticipated bus and support vehicle traffic and is inconsistent with existing zoning.

17. That pursuant to §36.1 of Chapter 85 of the Illinois Revised Statutes, the Northeastern Illinois Planning Commission has conducted "A 95 Hearing" on said project on March 27, 1986. Said hearing was conducted upon the application of the Chicago Area Transportation Study for the purpose of considering Amendment No. 4 to the FY86 Annual Element of the Transportation Improvement Program for Northeastern Illinois incorporating the FY86

Annual UMTA funded transit component for the six-county area. That included in said hearing was the project of acquiring and constructing a northshore garage facility at 2424 Oakton Street in Evanston (Project No. 1491) at a total cost of Two Million Three Hundred and Fifty-Two Thousand Six Hundred and Twenty Dollars ($2,352,620). That as a result of said hearing, the official project review recommendations of the Northeastern Illinois Planning Commission included the objections to the proposed acquisition and construction of the northshore garage facility at 2424 Oakton Street, Evanston. That said notice restricted the cost of the proposed improvement to Two Million Three Hundred Fifty-Two Thousand Six Hundred and Twenty Dollars ($2,352.620). That the A95 Review by the Northeastern Illinois Planning Commission although purely advisory, was a condition precedent to the implementation of said grant.

18. That pursuant to the provisions of 42 U.S.C. §4332, all agencies of the federal government must include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment a detailed statement by the responsible official on the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, alternatives to the proposed action, the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

That as indicated above, UMTA has taken the position that such environmental impact statement need not be provided. That the failure of UMTA to provide said statement renders the proposed grant null and void.

19. That by Ordinance No. SBD85-76, adopted on the

5th day of June, 1985, the defendant PACE purported to authorize its executive director to negotiate with the owner of the above-described property to acquire by purchase said property and to take any and all action necessary to effectuate acquisition of the real estate. That attached hereto and made a part of this Complaint as Exhibit A is said Ordinance No. SBD 85-76. That at its meeting of June 5, 1985, the Board of Directors of PACE purported to adopt said Ordinance without further action. That on information and belief at no time have the Board of Directors of PACE agreed at a duly called meeting to any specific amount to be paid for the acquisition of said property.

20. That notwithstanding the failure to set forth a price or to approve a specific amount for the purchase of said property in the Ordinance of June 5, 1985, the Executive Director of PACE purported to enter into a contract dated May 5, 1986, with NATIONAL STEEL SERVICE CENTER, INC. to purchase said property for the amount of Two Million Six Hundred Fifty Thousand Dollars ($2,650,000). That attached hereto and made part of this complaint as Exhibit B is a true and correct copy of said Agreement of Sale. That the only authorization for payment of Two Million Six Hundred and Fifty Thousand Dollars ($2,650,000) for said real estate purported to be the ordinance and action of the Board of Directors on June 5, 1985. That attached hereto and made part of this complaint as Exhibit C is a letter from the Executive Director to the City Manager of the City of Evanston indicating the authorization for the purchase of the National Steel site.

21. That the failure of the Board of Directors to specifically approve the price of Two Million Six Hundred and Fifty Thousand Dollars ($2,650,000) as the purchase price of said property renders null and void the execution of said purported agreement of sale attached to this complaint as Exhibit B.

22. That the City of Evanston has caused an appraisal

to be made of the value of the land and building purportedly to be acquired by PACE under the alleged Agreement of Sale dated May 5, 1986. That said appraisal by a well-known and reputable real estate appraiser indicates that the value of said property as of December 9, 1985 was One Million Four Hundred and Twenty-Five Thousand Dollars ($1,425,000). That attached hereto as Exhibit D is a preliminary report of said appraisal.

That the purchase of the subject property in the amount of Two Million Six Hundred Fifty Thousand Dollars ($2,650,000) is thus a totally unreasonable use of public funds and an improper exercise of the authority of the defendant PACE and UMTA. That the expenditure of more that One Million Dollars above the appraised value of said property is totally without lawful authority and constitutes a violation of the fiduciary duty owed to the public including the plaintiffs herein by PACE and UMTA, and a palpable abuse of direction.

23. That the location of the proposed bus facility at 2424 Oakton Street, Evanston, Illinois, would be highly detrimental to the public health and welfare of the individual plaintiffs and the City of Evanston in the following respects:

A. That it would increase congestion in the public streets already overburdened in and about the subject property;

B. That it would deprive the City of Evanston and its citizens of the use of said property for its highest and best use for a tax-paying manufacturing facility;

C. That it would violate the Zoning Ordinance and Comprehensive Plan of the City of Evanston by allowing an inharmonious land use to be located within the corporate limits of the City of Evanston;

D. That by reason of congestion, pollution, noise and other adverse environmental impacts, it would

depreciate surrounding property values and interfere with the use and enjoyment of nearby residential properties.

24. That the defendants herein propose to consummate the real estate transaction involved herein on or before June 23, 1986 to the disadvantage and injury of the plaintiffs. That the plaintiffs have no adequate remedy at law.

COUNT I

25. Plaintiffs reassert and reallege the allegations of paragraphs 1 through 24 of this Complaint.

26. That the alleged Agreement of Sale dated May 5, 1986 is unreasonable, invalid and void and against public policy for the reason that it constitutes an abuse of discretion by purporting to pay an amount in excess of One Million Dollars ($1,000,000) over the fair cash market value of the subject property.

27. That the alleged contract of May 5, 1986 is invalid and void in that the Board of Directors of PACE failed to approve the specific amount of the purchase price.

COUNT II

28. The plaintiffs reassert and reallege the allegations of paragraphs 1 through 24 of this Complaint herein as if they were set forth herein in haec verba.

29. That the purported contract of May 5, 1986 was null and void for the reason that lack of proper notice was given for public hearings on the acquisition of the subject property and the City of Evanston was not given direct notice of said hearings. That the A95 Review allegedly conducted by NIPC was totally invalid in that the notice understated the amount of money involved in the acquisition of the subject property.

COUNT III

30. The plaintiffs reassert and reallege the allegations of paragraphs 1 through 24 of this Complaint herein as if they were said allegations were set forth herein in haec verba.

31. That the defendant UMTA has failed to provide the environmental impact statement required by law and specifically required by 42 U.S.C. §4332 in that the funding and construction of said development is a major federal action within the meaning of 42 U.S.C. §4332 and not within the categorical exceptions applicable to environmental impact statements.

32. That the location of the proposed facility would be highly detrimental to the environment and public health and safety of the individual plaintiffs and the City of Evanston and the approval of said grant by UMTA without consideration of the environmental impact, the traffic conditions present and the comprehensive plan and zoning of the City of Evanston is arbitrary, unreasonable and contrary to law.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray:

A. That this Court enter its declaratory judgment declaring the rights of the parties to be as follows:

(1) That the alleged Agreement of May 5, 1986 under which PACE is to acquire the subject property from the defendant NATIONAL STEEL SERVICE CENTER, INC. is totally null and void.

(2) That the action of PACE and UMTA in allegedly agreeing to pay Two Million Six Hundred Fifty Thousand Dollars for the purchase of the subject property is arbitrary, unreasonable and void as against policy.

(3) That the failure to provide an environmental

impact statement is contrary to law and renders the alleged agreement and grant null and void.

(4) That lack of proper notice was given by UMTA and by NIPC with respect to A95 Review and the approval of the grant herein.

(5) That the location of the proposed facility would be highly detrimental to the environment and public health and safety of the plaintiffs.

B. That the defendants herein be temporarily restrained from taking any steps to consummate the transaction described hereinabove and from dispursing any funds for the purchase of the subject property; that upon hearing a preliminary injunction enjoining the defendants herein from proceeding to consummate said transaction be granted, and that upon a full hearing, said injunction be made permanent.

C. That this Court shall grant such other relief as shall be just and equitable in the premises.

CITY OF EVANSTON,
JOAN W. BARR, ANN RAINEY
and NORRIS LARSON,
Plaintiffs,

/s/ JACK M. SIEGEL

Their Attorney

JACK M. SIEGEL
39 South LaSalle Street
Chicago, Illinois 60603
312-263-2968

ORDINANCE NO. SBD 85-76

WHEREAS, it is necessary to accomplish the purposes as set forth in an act of the General Assembly of the State of Illinois known as the "Regional Transportation Authority Act as amended" that the Suburban Bus Division (SBD) acquire the fee simple title to the following described real estate, to wit:

Parcel I: The west 425 feet of the north west quarter of the north west quarter of section 25, township 41 north, range 13 east of the third principal meridian, the said 425 feet being measured at right angles to the west line of said section 25, (excepting from the foregoing described tract,, the following parts or parcels thereof: (1) the west 50 feet thereof; (2) that part of said tract lying south of a line drawn parallel to and 1056.86 feet south of the north line of said section 25 (measured at right angles to the north line of said section), (3) that part of said tract lying north of a line 611.00 feet south of the north west corner of said north west quarter, said line being drawn at right angles to the west line of said north west quarter);

Parcel II: That part of the west 425 feet of the north west quarter of the north west quarter of section 25, township 41 north, range 13 east of the third principal meridian, the said 425 feet being measured at right angles to the west line of said section 25, lying south of a line drawn parallel to and 1056.85 feet south of the north line of said section 25, measured at right angles to the north line of said section, (excepting from said described tract the west 50 feet thereof and that part thereof conveyed to the Chicago, North Shore and Northern Railroad, a Corporation of Illinois, for railroad purposes by deed dated June 25, 1924 and recorded September 4, 1924 as document 8575998 and falling within premises described as follows: beginning at a point in the south line of said north west quarter of the north west quarter of said section 25,

distant 66.08 feet east, measured along said south line from its intersection with the west line of said section 25: thence east of said south line of the north west quarter of the north west quarter of section 25, 1212.12 feet to an intersection with the east line of said north west quarter of the north west quarter of said section 25; thence north on said east line of the north west quarter of the north west quarter of said section 25; thence north on said east line of the north west quarter of the north west quarter of said section 25, 5 feet to a point; thence northwesterly on a straight line making an angle to the left with the last described course at the last described point of 92 degrees 15 minutes and 6 seconds, 675 feet to a point distant 10 feet northwesterly measured at right angles from said south line of the north west quarter of the north west quarter of section 25; thence northwesterly on a straight line making an angle to the right with the last described course at the last described point of 2 degrees, 53 minutes and 51 seconds, 397.21 feet to a point; thence southwesterly on a straight line making an angle to the left with the last described course at the last described point of 89 degrees, 56 minutes and 31 seconds, 5 feet to a point; thence northwesterly at right angles to the last described course 139 feet to a point; thence south parallel with the west line of said section 25, 36.27 feet to the place of beginning.)

Parcel III: The west 590 feet, measured at right angles to the west line of section 25, of the north west quarter of the north west quarter of section 25, township 41 north, range 13 east of the third principal meridian, (excepting therefrom: (1) the west 470 feet thereof, measured at right angles to the west line of said section 25, (2) the west 550 feet lying north of a line 611 feet south of the north west corner of said north west quarter, said line being drawn at right angles to the west line of said north west quarter,

(3) the north 47 feet thereof lying in Oakton Street, (4) that part thereof included in the following description: beginning at a point in the south line of said north west quarter of the north west quarter of said section 25, distant 66.08 feet east, measured along said south line, from its intersection with the west line of said section 25; thence east on said south line of the north west quarter of the north west quarter of said section 25, 1212.12 feet to an intersection with the east line of the said north west quarter of the north west corner of said section 25; thence north on said east line of the north west quarter of the north west quarter of said section 25, 5 feet to a point; thence north westerly on a straight line making an angle to the left with the last described course at the last described point of 92 degrees 15 minutes and 6 seconds, 675 feet to a point distant 10 feet northerly, measured at right angles from the said south line of the north west quarter of the north west quarter of said section 25; thence northwesterly on a straight line making an angle to the right with the last described course at the last described point of 2 degrees, 53 minutes and 51 seconds, 397.21 feet to a point; thence southwesterly on a straight line making an angle to the left with the last described course at the last described point of 89 degrees 56 minutes 31 seconds, 5 feet to a point; thence northwesterly at right angles to the last described course 139 feet to a point; thence south parallel with the west line of said section 25, 36.27 feet to the place of beginning being premises conveyed to Chicago North Shore and Northern Railroad Company by deed recorded as document 8575998, and (5) that part thereof described as follows: beginning at the point of intersection of the south line of Oakton Street with a line drawn parallel to and 425 feet east of the west line of said section 25 (said 425 feet being measured at right angles to said west line of said section 25; thence south along said line 425 feet east of

and parallel with the west line of said section 25, a distance of 150 feet; thence east along a line parallel with the south line of Oakton Street a distance of 650 feet; thence north along a line parallel with the west line of said section 25 a distance of 150 feet to the south line of Oakton Street; thence west along the south line of Oakton Street a distance of 650 feet to the place of beginning;

Parcel IV: The west 470 feet, measured at right angles to the west line of section 25, of the north west quarter of the north west quarter of section 25, township 41 north, range 13 east of the third principal meridian, (except therefrom: (1) the west 425 feet thereof measured at right angles to the west line of said section 25, (2) that part of said tract lying north of a line 611.00 feet south of the north west corner of said north west quarter, said line being drawn at right angles to the west line of said north west quarter; (3) that part thereof included in the following description: beginning at a point in the south line of said north west quarter of the north west quarter of said section 25, distant 66.08 feet east measured along said south line from its intersection with the west line of said section 25; thence east on said south line of the north west quarter of the north west quarter of said section 25, 1212.12 feet to an intersection with the east line of the said north west quarter of the north west quarter of said section 25; thence north on said east line of the north west quarter of the north west quarter of said section 25, 5 feet to point; thence northwesterly on a straight line making an angle to the left with the last described courses at the last described point at 92 degrees 15 minutes 6 seconds, 675 feet to a point distant 10 feet northwesterly measured at right angles from the said south line of the north west quarter of the north west quarter of said section 25; thence northwesterly on a straight line making an

angle to the right with the last described course at the last described point of 2 degrees 53 minutes and 51 seconds, 397.21 feet to a point; thence southwesterly on a straight line making an angle to the left with the last described course at the last described point of 89 degrees 56 minutes and 31 seconds, 5 feet to a point; thence northwesterly at right angles to the last described course 139 feet to a point; thence south parallel with the west line of said section 25, 36.27 feet to the place of beginning, being premises conveyed to Chicago, North Shore and Northern Railroad Company by deed recorded as document 8575998);

Parcel V: The west 50 feet, measured at right angles to the west line of section 25, of the north west quarter of the north west quarter of section 25, township 41 north, range 13 east of the third principal meridian, lying south of a line 611.00 feet south of the north west corner of said north west quarter, said line being drawn at right angles to the west line of said north west quarter;

Parcel VI: The east 40.05 feet of the west 165.21 feet of lots 1 and 2, all taken as a tract, in William B. Johnson's Subdivision being a Subdivision in the north west quarter of the north west quarter of Section 25, township 41 north, range 13 east of the third principal meridian, all in Cook County, Illinois.

WHEREAS, Article III - A.09 and Article II .20 (b) of the Regional Transportation Authority Act as amended authorizes the Suburban Bus Division to acquire and hold property it deems appropriate in the exercise of its powers.

NOW, THEREFORE, BE IT HEREBY ORDAINED BY THE BOARD OF DIRECTORS OF THE SUBURBAN BUS DIVISION, AS FOLLOWS:

SECTION 1: That the Executive Director of the SBD or his designee is hereby authorized and directed to negotiate with the owner or owners of said real

estate on behalf of the SBD to acquire by purchase the fee simple title to said real estate at a price which does not exceed the federal and state administrative, permissive limits to the highest value of said real estate heretofore appraised.

SECTION 2: That in the event that the fee simple title of the aforesaid real estate cannot be acquired from the owner or owners thereof by purchase as herein authorized, the Executive Director is hereby authorized to request on behalf of the SBD that the Regional Transportation Authority take any and all steps convenient or necessary to acquire the aforesaid real estate by the exercise of eminent domain in court of proper jurisdiction.

SECTION 3: The Executive Director of the SBD or his designee is hereby authorized to take any and all action necessary to effectuate acquisition of the real estate described herein.

SECTION 4: The acquisition of the real estate which is the subject of this Ordinance shall be subject to approval by the United States Department of Transportation, Urban Mass Transportation Administration and the Illinois Department of Transportation, and the Executive Director of the SBD or his designee is hereby authorized to take any and all action necessary to obtain such approvals.

Adopted by the Board of Directors of the SBD at this meeting this 5th day of June, 1985.

VOTING AYE: 11

DIRECTORS: Ganet, Goben, Hausmann, Rita, Stranczek, Squires, Verbic, Warning, Welton, Zettek, Boone

VOTING NAY: 0

ABSENT: 1

DIRECTORS: Marunde

/s/ FLORENCE H. BOONE

Chairman

(Seal)

Attest:

/s/ PATRICIA HEIDER

Secretary

AGREEMENT OF SALE

THIS AGREEMENT effective as of the 5th day of May, 1986, by and between NATIONAL STEEL SERVICE CENTER, INC., a corporation organized and existing under the laws of the State of New Jersey, having its principal office at One Century Drive, Parsippany, New Jersey 07054 (hereinafter "Seller") and SUBURBAN BUS DIVISION OF THE REGIONAL TRANSPORTATION AUTHORITY, a municipal corporation organized and existing under the laws of the State of Illinois, having its principal office at 550 West Algonquin Road, Arlington Heights, Illinois 60005 (hereinafter "Purchaser").

WITNESSETH:

WHEREAS, Seller desires to sell and Purchaser desires to purchase approximately nine and seven tenths (9.7) acres of land, together with a building located thereon occupying fifty-eight thousand (58,000) square feet situated in the City of Evanston, Cook County, Illinois, and all rights, privileges, tenements, hereditaments, easements and appurtenances thereto.

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, the parties hereto, intending to be legally bound, agree as follows:

1. *Purchased Property.* Seller hereby agrees to sell and Purchaser hereby agrees to purchase approximately nine and seven tenths (9.7) acres of land (the "Land") situated in the City of Evanston, County of Cook, State of Illinois, as more particularly described in Exhibit A attached hereto and made a part hereof, together with a one-story building located thereon occupying fifty-eight thousand (58,000) square feel (the "Building"), together with all rights, privileges, tenements, hereditaments, easements and appurtenances thereto (hereinafter collectively referred to as the "Purchased Property"); *provided, however,* that Seller hereby excepts and reserves unto itself, its successor and assigns, the full, free liberty and right at

all times hereafter, to have and use any and all utility easements now or hereafter existing on, above or below the Purchased Property, including but not limited to easements for gas, water, sewer and electric power utility lines, which may now or hereafter be required by Seller in connection with its use and occupation of the remaining property now owned by Seller and adjoining the Purchased Property (the "Adjoining Property"). The Purchased Property shall be conveyed by Seller to Purchaser by General Warranty Deed, excepting and reserving the easements as aforesaid.

Upon the execution of this Agreement, the parties agree to use their best efforts to cause the separate metering and/or division of utility lines now serving both the Purchased Property and the Adjoining Property and may be necessary or desirable to provide separate and distinct utility services to the Purchased Property and the Adjoining Property.

2. *Purchase Price.* Seller and Purchaser agree that the total consideration for the Purchased Property shall be Two Million Six Hundred Fifty Thousand Dollars ($ 2,650,000.00).

3. *Closing and Possession.* The closing of this transaction in escrow shall take place at the main office of the Escrow Agent (as hereinafter defined), or at such other location mutually acceptable to Seller and Purchaser, on or before June 23, 1986 (the "Closing Date"). Purchaser shall have possession on the date of closing.

4. *Title Insurance, Survey and Deed Preparation.* The cost of the owner's policy of title insurance for the Purchased Property shall be borne by the Seller. The costs of an updated survey of the Purchased Property and deed preparation shall be borne by the Seller.

5. *Realty Transfer Taxes.* This transaction is exempt from payment of transfer taxes.

6. *Escrow Agent.* Simultaneously with the execution of this Agreement, the parties shall cause an escrow account (the "Escrow Account") to be opened at the main office of Chicago Title Insurance Company, 111 West Washington Street, Chicago, Illinois 60602 for the purpose of securing the performance by the parties of their respective obligations under this Agreement.

Upon the opening of said Escrow Account, the parties agree to execute an escrow agreement (the "Escrow Agreement") substantially in the form of agreement attached hereto as Exhibit B which shall provide, *inter alia*, for the appointment of Chicago Title Insurance Company as escrow agent (the "Escrow Agent") and shall contain such other terms and conditions as may be necessary to consummate the transaction contemplated by this Agreement.

On or before the Closing Date, the Seller shall deposit into the Escrow Account a general warranty deed to the Purchased Property, duly executed and acknowledged and in recordable form sufficient to convey the fee title in and to the Purchased Property as required to be conveyed hereunder by the Seller; and Purchaser shall deposit into the Escrow Account the Purchase Price.

7. *Prorations.* The parties agree to the usual and customary prorations. Real estate taxes shall be prorated to the date of closing based on the most recent ascertainable Real Estate Tax Bill. After closing, Seller shall petition the Cook County Assessor for a division of real estate taxes. 1985 and 1986 taxes shall be reprorated when the tax division has been approved.

8. *Inspection and Warranties.* It is expressly understood by the parties that the Purchased Property has been inspected by the Purchaser and the Purchaser has conducted testing and sampling on the Purchased Property as deemed appropriate by Purchaser. Except as provided herein, Seller makes no representations or warranties, express or implied, with respect to the physical condition

of the Purchased Property. Seller warrants that it has not received written notice from any governmental authority alleging that Seller has failed to comply with any applicable law, ordinance, regulation, statute, rule or restriction which would materially affect the enjoyment, ownership or use of the Purchased Property.

9. *Removal of Equipment.* After the Closing Date, Seller shall remove from the Purchased Property, at its sole cost and expense, all of Seller's equipment located thereon (the "Equipment") in accordance with a mutually agreeable time schedule. Upon removal of the Equipment, Seller agrees, at its sole cost and expense, to repair any damages to the Purchased Property caused by such removal, including, but not limited to, repair and restoration of the concrete floor of the building.

10. *Demolition and Repair of Building Wall.* Seller shall, as its sole cost and expense, perform or cause to be performed certain demolition and repair work to the Building in accordance with plans and repair work to the Building in accordance with plans and specifications and a schedule of completion which shall be mutually agreed upon by the parties prior to the consummation of such work by Seller. Seller shall perform or cause to be performed such work in a manner which minimizes any interference with or impairment of Purchaser's use and enjoyment of any other portion of the Building.

11. *Oxford Realty Group, Inc. Lawsuit.* Purchaser has knowledge of the case of *Oxford Realty Group, Inc. vs. National Intergroup, Inc., National Intergroup Realty Corporation, National Steel Service Center, Inc. and Korhumel Steel and Aluminum Company,* No. 85CH7924, as filed on August 9, 1985 in the Circuit Court of Cook County, Illinois, Chancery Division (the "Oxford Lawsuit"). Seller states that it and the other defendants in the Oxford Lawsuit will vigorously defend their position therein and that they expect to ultimately prevail in

this matter. Seller agrees to indemnify and hold harmless Purchaser from all or any manner of action and actions, cause or causes of action, suits, debts, damages, judgments, claims, and demands whatsoever in law or in equity, including attorneys' fees, which shall or may arise from said lawsuit or which may be brought against Purchaser by Oxford Realty Group, Inc., its successors and assigns. On the basis of the foregoing assessment of the Oxford Lawsuit by Seller and on the basis of the foregoing indemnification by Seller, Purchaser waives whatever objections it might otherwise have to Seller's title to the Purchased Property which are founded on the Oxford Lawsuit and Purchaser agrees that the existence of the Oxford Lawsuit shall not prevent Seller from conveying to Purchaser good and marketable title to the Purchased Property.

12. *City of Evanston.* The parties acknowledge that during the course of negotiations leading to execution of this Agreement the City of Evanston has threatened to acquire both Purchased Property and Adjoining Property through eminent domain and further, the City of Evanston amended its zoning ordinance, changing Purchaser's intended use from a permitted use to a special use.

Parties hereto agree that Evanston's actions shall not be cause for delay or postponement in closing this transaction or relieving the parties from carrying out their obligations required after closing.

Purchaser hereby waives whatever objection it may have to Seller's title to the Purchased Purchased Property founded on actions by the City of Evanston.

If consent of the City of Evanston is required for Purchaser's intended use of the subject property both parties agree to use their best efforts to obtain such approval, if required. Provided, however, that Purchaser, at its sole cost, may take any action it deems desirable regarding the City of Evanston.

13. *Brokers.* Seller shall pay broker's commission related to the engagement to Caldwell Banker. Each of the Seller and Purchaser represents to the other, that other than the relationship of Caldwell Banker and other than as identified in this agreement, no party is entitled to receive, or has asserted the right to receive, from Seller or Purchaser, respectively, any broker's finder's, investment banking or other similar fee with respect to the transactions contemplated hereunder. Each of Seller and Purchaser shall idemnify the other in the event of any loss, claim or damage, including legal expenses, arising from any third party claim asserted against Seller or Purchaser, respectively, due to the action of the other party.

14. *Failure to Close.*

(a) In the event the Purchaser fails to close for any reason the Seller shall be entitled to be paid the sum of $50,000.00 as liquidated damages, and this Agreement shall thereupon terminate and be of no further force and effect.

(b) In the event the Seller fails to close for any reason, this Agreement shall thereupon terminate and be of no further force and effect. Purchaser hereby reserves all additional claims and remedies against Seller, including, but not limited to, claims for loss of bargain, consequential damages, or specific performance.

15. *Title to Purchased Property.* On the Close of Escrow, Seller shall convey to Purchaser good and marketable title to the Purchased Property by General Warranty Deed, subject to easements and restrictions of record or which an accurate survey or physical inspection would reveal and subject to those easements reserved and excepted by Seller purchase to Paragraph 1 hereof.

16. *Miscellaneous.*

(a) *Notices.* Any notice which may be required or permitted to be given under any provisions of this agreement

shall be deemed to have been effectively given and received upon deposit in the United States registered or certified mail, postage pre-paid, addressed as follows:

If to Seller:

National Steel Service Center, Inc.
One Century Drive
Parsippany, NJ 07054

If to Purchaser:

Pace, Suburban Bus Division of
Regional Transportation Authority
550 West Algonquin Road
Arlington Heights, IL 60005

Either party may change its address for purposes of this provision by giving written notice of such change in the manner above provided.

(b) *Waiver, Invalidity.* It is mutually understood and agreed that any failure by either party at any time, or from time to time, to enforce or require the strict keeping and performance by the other party of any of the provisions of this Agreement shall not constitute a waiver of such provisions, and shall not affect or impair such provisions in any way, or the right of the party at any time to avail itself of such remedies, and any invalidity and/or unenforceability of any provision in this Agreement shall not affect the validity of any other provisions herein.

(c) *Assignability.* Neither the Purchaser nor the Seller shall assign this Agreement or any provision or portion hereof without the prior written consent of the other party.

(d) *Entire Agreement; Modification.* This Agreement embodies the entire agreement and understanding between the parties and any and all prior or contemporaneous proposals, negotiations, agreements, commit-

ments and representations, oral or written, are merged herein. This Agreement shall not be modified, amended or waived except by means of an instrument in writing executed by or on behalf of the parties subsequent to the date hereof which states that it is intended to amend this Agreement.

(e) *Counterparts.* This Agreement may be executed in one or more counterparts and each such counterpart shall be deemed to be an original document.

(f) *Governing Law.* This Agreement shall be governed by and construed in accordance with the laws of the State of Illinois.

(g) *Survival of Covenants.* Unless otherwise provided herein, the covenants and agreements contained herein shall survive the Close of Escrow.

IN WITNESS WHEREOF, the parties have executed this Agreement the date first above written.

ATTEST:
/s/ WILLIAM RUFF

NATIONAL STEEL SERVICE CENTER, INC.

By: /s/ THOMAS E. BOEHM

Title: Vice President

ATTEST:
/s/ PATRICIA HEIDER

Secretary

SUBURBAN BUS DIVISION OF THE REGIONAL TRANSPORTATION AUTHORITY

By: /s/

Title: Executive Director

June 2, 1986

Mr. Joel Asprooth
City Manager
City of Evanston
2100 Ridge Avenue
Evanston, Illinois 60204

Dear Joel:

Enclosed as you requested is a copy of the ordinance authorizing the purchase of the National Steel site, the minutes of the meeting when the ordinance was approved and a copy of the Agreement of Sale.

Sincerely,

/s/ JOSEPH DIJOHN

Joseph DiJohn
Executive Director

JD/pm
Enc.

December 9, 1985

Mr. Joel Asprooth
City Manager
City of Evanston
2100 Ridge Avenue
Evanston, Illinois 60204

Re: The southerly portion of the
National Steel Service property
2310-2450 Oakton Street
Evanston, Illinois

Dear Mr. Asprooth:

At your request I have personally inspected the exterior of the subject property and find as follows:

An approximate 9.7 acre (422,532 square foot) generally rectangular parcel of land plus an access portion extending to Oakton Street improved with an approximately 58,000 square foot generally rectangular high ceiling corrugated metal industrial warehouse type building. This building is attached to one of several older brick portions of the National Steel Service buildings on land zoned M-4.

It is my preliminary opinion that the December 9th, 1985 market value of the subject property is: $1,425,000.

Very truly yours,

/s/ NEIL J. KING

Neil J. King

NJK:rl

APPENDIX D

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

CITY OF EVANSTON, a municipal corporation, JOAN W. BARR, ANN RAINEY and NORRIS LARSON,

Plaintiffs,

vs.

REGIONAL TRANSPORTATION AUTHORITY, a municipal corporation, SUBURBAN BUS DIVISION OF THE REGIONAL TRANSPORTATION AUTHORITY, a municipal corporation, NATIONAL STEEL SERVICE CENTER, INC., a corporation organized and existing under the laws of the State of New Jersey and URBAN MASS TRANSPORTATION ADMINISTRATION, a division of the United States Department of Transportation,

Defendants.

No. 86 C 3963

Judge James F. Holderman

PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

NOW COME the plaintiffs, CITY OF EVANSTON, a municipal corporation, JOAN W. BARR, ANN RAINEY and NORRIS LARSON, by JACK M. SIEGEL, their attorney, and moves this Honorable Court for a temporary restraining order against the defendants REGIONAL TRANSPORTATION AUTHORITY, SUBURBAN BUS DIVISION OF THE RTA, NATIONAL STEEL SERVICE CENTER, INC. and URBAN MASS TRANSPORTATION ADMINISTRATION, a division of the United States

Department of Transportation. Plaintiffs move to temporarily restrain the defendants and each and every one of them from consummating a certain real estate transaction whereby the SUBURBAN BUS DIVISION OF THE RTA would acquire the property commonly known as 2424 Oakton Street in Evanston, Illinois, all as more fully set in the Complaint which is attached hereto and made part of this Motion. In support of this motion, plaintiffs say as follows:

1. That the defendants' proposed acquisition of the subject property would constitute an unreasonable abuse of discretion on the part of the governmental entities which are the defendants herein and would result in the expenditure of more than Two and a Half Million Dollars of public funds in violation of several provisions of federal law.

2. That the defendants herein propose to consummate the real estate transactions challenged on or before June 23, 1986.

3. That the defendants have failed to provide an environmental impact statement as required by federal law in the case of a major federal action.

4. That the plaintiffs have no adequate remedy at law and will suffer immediate and irreparable injury if the proposed real estate transaction and development contemplated take place for the reason that said transaction will result in an irrevocable loss of federal funds, the construction of a facility having a substantial adverse impact upon the finances of the City of Evanston and the environment of the community in which the subject property is located.

5. That the irreparable harm that the plaintiffs will suffer if a temporary restraining order is not granted outweighs the irreparable harm the defendants will suffer if said temporary restraining order is granted.

6. That the plaintiffs have a significant likelihood of success on the merits and the public interest would be

served by granting the requested temporary restraining order.

7. That the proposed use of the property sought to be acquired is not necessary or desired by the party proposed to utilize the premises, to-wit: NORTRAN and the use of the premises as proposed would be contrary to the public interest.

8. In support of this motion, plaintiffs submit the attached supporting affidavit of Joel Asprooth, City Manager of the City of Evanston.

CITY OF EVANSTON, a municipal corporation, et al., Plaintiffs

By /s/ JACK M. SIEGEL
Their Attorney

JACK M. SIEGEL
39 South LaSalle Street
Chicago, Illinois 60603
312-263-2968

STATE OF ILLINOIS

COUNTY OF COOK

AFFIDAVIT

JOEL ASPROOTH, first being duly sworn on oath, deposes and says as follows:

1. That he is the duly appointed and acting City Manager of the City of Evanston, one of the plaintiffs herein.

2. That he has examined the allegations of the complaint heretofore filed herein and that the allegations of said complaint are true in substance and in fact.

3. That the proposed use of the subject property, to-wit: 2424 Oakton Street, Evanston, Illinois, is not a permitted use under the Zoning Ordinance of the City of Evanston but is instead a special use. That no special use for such facility has been granted by the City of Evanston and the location of said facility on the subject property would be contrary to the comprehensive plan of the City of Evanston.

4. That the City of Evanston has engaged a reputable and competent real estate appraiser, Mr. Neil J. King for the purpose of ascertaining the value of the subject property for the purpose of condemnation proceedings against said property. That said appraiser has indicated to the City of Evanston that the fair cash market value of the subject property was One Million Four Hundred Twenty-Five Thousand Dollars ($1,425,000) and not Two Million Six Hundred and Fifty Thousand Dollars ($2,650,000) as provided in the real estate contract which is the subject matter of this litigation.

5. That the source of funds for the acquisition of the subject property are federal funds administered by the Urban Mass Transportation Administration, a division of the United States Department of Transportation. That in the opinion of the affiant, the expenditure of said funds would constitute an unwarranted waste of the public treas-

ury and would be contrary to the specific provisions of federal law as set forth in the Urban Mass Transportation Assistance Act of 1970.

6. That the affiant has been informed and believes that NORTRAN, a public agency which furnishes bus transportation in the north and northwest suburban area of Cook County has expressed its opposition to the use of a bus facility at the location proposed. That the City of Evanston is a member of NORTRAN and is fully aware of the position and desires of NORTRAN.

7. That the removal of the subject property from the tax rolls of the City of Evanston would be highly detrimental to the financial welfare of the City in that it would remove one of the most desirable and substantial parcels for industrial or commercial development within the City.

8. That the location of the proposed facility at 2424 Oakton Street, Evanston, Illinois, would be highly detrimental to the traffic pattern in the area and produce congestion, pollution and noise which, in turn, would depress surrounding property values as well as cause traffic problems.

Further affiant sayeth not.

/s/ JOEL ASPROOTH
Joel Asprooth

SUBSCRIBED AND SWORN TO
before me this 10th day
of June, 1986.

/s/ ROSEMARIE G. PORTELE
Notary Public

APPENDIX E - Statutes Involved

5 USC §702

§702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat. 392; Oct. 21, 1976, P. L. 94-574, § 1, 90 Stat. 2721.)

5 USC § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat. 393.)

42 USC §4332

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with

the policies set forth in this Act [42 USCS §§ 4321 et seq.], and (2) all agencies of the Federal Government shall —

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act [42 USCS §§ 4341 et seq.], which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should be implemented.

Prior to making any detailed statement, the responsi-

ble Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code [5 USC § 552], and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act [42 USCS §§ 4321 et seq.]; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[;]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and longrange character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by title II of this Act [42 USCS §§ 4341 et seq.].

(Jan. 1, 1970, P. L. 91-190, Title I, § 102, 83 Stat. 853; Aug. 9, 1975, P. L. 94-83, 89 Stat. 424.)

49 USC §1602

(d) Notice and public hearings. Any application for a grant or loan under this Act [49 USCS §§ 1601 et seq.] to finance the acquisition, construction, reconstruction, or

improvement of facilities or equipment which will substantially affect a community or its mass transportation service shall include a certification that the applicant —

(1) has afforded an adequate opportunity for public hearings pursuant to adequate prior notice, and has held such hearings unless no one with a significant economic, social, or environmental interest in the matter requests a hearing;

(2) has considered the economic and social effects of the project and its impact on the environment; and

(3) has found that the project is consistent with official plans for the comprehensive development of the urban area.

Notice of any hearings under this subsection shall include a concise statement of the proposed project, and shall be published in a newspaper of general circulation in the geographic area to be served. If hearings have been held, a copy of the transcript of the hearings shall be submitted with the application.

49 USC §1604 (h)

(h) Submission by Governor or designated recipient and approval by Secretary of surveys, plans, etc., of proposed projects; grant or contract agreement as contractual obligation of Federal government; criteria for approval of projects. (1) The Governor or the designated recipient of the urbanized area shall submit to the Secretary for his approach such surveys, plans, specifications, and estimates for each proposed project as the Secretary may require. The Secretary shall act upon such surveys, plans, specifications, and his entering into a grant or contract agreement with respect to any such project shall be a contractual obligation of the Federal Government for the payment of its proportional contribution thereto.

(2) In approving any project under the section, the Secretary shall assure that possible adverse economic, social,

and environmental effects relating to the proposed project have been fully considered in developing the project, and that the final decisions on the project are made in the best overall public interest, taking into consideration the need for fast, safe, and efficient transportation, public services, and conservation of environment and natural resources, and the costs of eliminating or minimizing any such adverse effects, including —

(A) air, noise, and water pollution;

(B) destruction or disruption of manmade and natural resources, esthetic values, community cohesion, and the availability of public facilities and services;

(C) adverse employment effects, and tax and property value losses;

(D) injurious displacement of people, businesses, and farms;

(E) disruption of desirable community and regional growth.

No. 87-549

In The
Supreme Court of the United States
October Term, 1987

CITY OF EVANSTON, a municipal corporation, JOAN W. BARR, ANN RAINEY and NORRIS LARSON,

Petitioners,

v.

REGIONAL TRANSPORTATION AUTHORITY, a municipal corporation, SUBURBAN BUS DIVISION of the REGIONAL TRANSPORTATION AUTHORITY, a municipal corporation, NATIONAL STEEL SERVICE CENTER, INC., a New Jersey corporation and the URBAN MASS TRANSPORTATION ADMINISTRATION, a division of the UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondents.

Petition For a Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW RESTATED

1. Whether the Seventh Circuit Court of Appeals was correct in affirming the district court's order dismissing the plaintiffs' complaint for lack of standing?

2. Whether the plaintiffs' complaint sufficiently alleged environmental damage in the change in use of the subject property from a steel business to a bus garage?

STATEMENT REQUIRED BY RULE 28.1

Respondents, Regional Transportation Authority, and Pace Suburban Bus Division of the Regional Transportation Authority are municipal corporations which has no parent company, nor any affiliates or subsidiaries.

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Respondents, Regional Transportation Authority and Pace Suburban Bus Division of the Regional Transportation Authority respectfully request that the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be denied.

OPINIONS BELOW

Respondents adopt the statement of the Opinions Below set out in the Petition for Writ of Certiorari.

JURISDICTION

Respondents agree that the judgment of the Court of Appeals for the Seventh Circuit was entered on July 10, 1987 and that no petition for rehearing was filed.

Respondents further agree that the jurisdiction of this Court was invoked pursuant to the provisions of 28 U.S.C. sec. 1254 and that the Petition for Writ of Certiorari was filed pursuant to 28 U.S.C. sec. 2101.

Respondent denies that the allegations of the complaint have invoked jurisdiction of this Court pursuant to 49 U.S. 161 et seq. 42 U.S.C. 4321 or 5 U.S.C. sec. 702 and 706 as claimed by the petitioners.

STATUTES INVOLVED

Respondent agrees that this case involves the provisions of the Urban Mass Transportation Act, and the National Environmental Policy Act. Respondent denies that this case involves the Administrative Procedures Act as claimed by the Petitioner.

STATEMENT OF THE CASE

Except as noted herein, respondent agrees with the Statement of the Case set out in the Petition for Writ of Certiorari.

Several facts which have been omitted from the petitioners' Statement of the Case are particularly noteworthy and were in fact relied on by the Seventh Circuit Court of Appeals.

The property which is the subject matter of this action was, prior to the purchase by Pace, the respondent hereto, utilized by the National Steel Service Center as a steel fabricating plant.

Furthermore, prior to the divulgence of the intent of Pace to enter into negotiations with National Steel to purchase the property, the property was zoned M-4 with no special use restrictions.

The M-4 zoning designation is the highest, most intense industrial use allowed by Evanston's zoning ordinance.

Lastly, the petitioners fail to point out that they never requested leave of Court to amend their complaint as was their right.

REASONS FOR DENYING WRIT

The plaintiff's petition for writ of certiorari should be denied because contrary to the plaintiffs assertions, the decision of the Seventh Circuit Court of Appeals upholding the district courts ruling is not in conflict with the decisions of this Court on issues of standing and pleading in the federal court. The decision of which the plaintiff seeks a writ of certiorari and reversal was based on established precedent of this Court and other Federal Courts of Appeals, and was the proper ruling given the facts as pleaded in the plaintiffs complaint.

On the issue of standing as it relates to the plaintiffs claim of harm due to federal agency action, the decision was in accord with the following cases: *Transamerica Mortgage Advisors Inc. v. Lewis* 444 U.S. 11, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979), *California v. Sierra Club* 451 U.S. 287, 101 S.Ct. 1775, 68 L.Ed.2d 101 (1981), *Universities Research Association v. Coutu* 450 U.S. 754, 101 S.Ct. 1451, 67 L.Ed.2d 662 (1981), *Baker v. Carr* 369 U.S. 186, 82 S.Ct. 691 7 L.Ed.2d 663 (1962), *Valley Forge Christian College v. Americans United for Separation of Church & State Inc.* 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 760 (1982), *Rapid Transit Advocates v. Southern California Rapid Transit District* 752 F.2d 373 (9th Cir. 1985), *River Road Alliance v. Corps of Engineers* 764 F.2d 445, (7th Cir. 1985) *cert. denied* 106 S.Ct. 1283 (1986), *City of West Chicago v. United States Nuclear Regulatory Commission* 701 F.2d 632 (7th Cir. 1983), *Robinson v. Knebel* 550 F.2d 422 (8th Cir. 1977).

The plaintiffs claim of error relating to issues of pleading in the federal court are framed in terms of whether the complaint stated enough facts to withstand the motion to dismiss and whether the facts as pleaded should have placed the court on notice of the plaintiffs implied claim of jurisdiction under 5 USC 702 (The Administrative Procedure Act).

The Court of Appeals correctly ruled that the plaintiff had failed to allege the APA as a basis for jurisdiction and their decision is thus in accord with FRCP (8) (a), *United States of America ex rel Keith Becker v. Simmons* 357 F.Supp. 1135, *Matherly v. Lamb* 414 F.Supp. 364, *Bowman v. White* 388 F.2d 756 and others.

The plaintiffs never sought leave to amend their complaint and cannot now claim error on an issue never raised by the pleadings. See *Lektro Vend Corp. v. Vendo Co.* 545 F.2d 1050 (7th Cir. 1976).

Notwithstanding the above matters relating to proper pleading, the decision of the Court of Appeals was in accord with this Court's holding in *Califano v. Sanders* 430 U.S. 99, 97 S.Ct. 986, 51 L.Ed.2d 192 (1977) and *Valley Forge v. Americans United* 454 U.S. 464.

The majority of the plaintiffs claims are directed at allegations of misspent federal funds which were the basis of the grant from the Urban Mass Transit Administration (UMTA) to the Suburban Bus Division of the Regional Transportation Authority. (Pace). These claims are based on the plaintiffs claimed standing as a taxpayer and were properly rejected by the Court of Appeals in accord with this Court's ruling in *Flast v. Cohen* 392 U.S. 83, 88 S.Ct. 1942 20 L.Ed.2d 947 (1968) *Schlesinger v. Reservists Committee to Stop the War* 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974) and *Valley Forge v. Americans United* 454 U.S. 464.

Setting aside the claims of misspent federal funds which are clearly precluded by the plaintiffs lack of taxpayer standing, the remaining issues raised by the complaint are all related to local problems which are better addressed by local state courts ruling on zoning matters.

I.

THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS WAS NOT IN CONFLICT WITH OTHER DECISIONS OF THIS COURT.

An analysis of the cases cited by the plaintiff to stand for the proposition that the Seventh Circuit Court of Appeals' decision affirming the district court's dismissal of the action was incorrect, illustrates how those cases can be distinguished from this case. A further analysis of other cases of this Court and other federal courts will show how the decision was in accord with those decisions.

The petitioners argue that the decision of the Seventh Circuit Court of Appeals is in conflict with, among other cases, *Merrill, Lynch, Pierce, Fenner & Smith v. Curran* 456 U.S. 353, 102 S.Ct. 1825, 72 L.Ed.2d 182 (1982). That case whose holding was related to issues of standing sought the answer to a different question than that asked by the district court and the Seventh Circuit Court of Appeals in the case at bar. In *Merrill, Lynch* the Court analyzed a statute enacted with criminal penalties and later amended. The question was whether, considering the amendment, Congress intended to create private civil remedies. Since *Merrill, Lynch* was decided on the rather narrow issue of whether an amendment to a statute gave a hint of Congressional intent, the holding in that case could not be and is not in conflict with the ruling of the Court of Appeals in this case.

In *Gladstone v. Bellwood*, 441 U.S. 91, and *Arlington Heights v. Metropolitan* 429 U.S. 252, the Court was asked to rule on standing issues when a claim was made of a violation of the Fair Housing Act of 1968 (42 USCA sec. 2610 et seq) and the Civil Rights Act which by its terms "may be enforced by civil actions in appropriate United States district courts."

The questions relating to issues of standing in those cases were far removed from the issues raised by the City of Evanston in its complaint and are therefore not in conflict with the decision of the Appellate Court.

In *Cannon v. U of C* 441 U.S. 677 the Court reviewed the matter of standing as it applied to a claim of a violation of a federal statute by a private defendant, not an arm of the federal government as in the case at bar. In *Cannon* the Court applied the standard identified in *Cort v. Ash* 422 U.S. 66, 95 S.Ct. 2080 45 L.Ed.2d 26 (1975) to determine whether the plaintiff had standing. In *Cort* this Court held that the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person. The threshold question is whether the statute was enacted for the benefit of a special class of which the plaintiff is a member.

The Seventh Circuit Court of appeals correctly applied the facts raised by the plaintiffs and the statutes claimed to invoke the courts' jurisdiction to the standards identified in Cort to determine whether the complaint did clothe the plaintiffs with standing. The Court correctly ruled that the statutes did not imply a private right of action because among other issues, the statutes were not enacted for the benefit of a special class of which the plaintiffs were members. Therefore, not only was the decision of the Seventh Circuit Court of Appeals not in conflict with *Cannon* as the petitioners claim, but it was in accord with *Cannon* and *Cort*, the case upon which *Cannon* was based.

The Court of Appeals correctly affirmed the lower courts dismissal of this question of standing raised in *Cort v. Ash* by relying on this Court's decision in *Transamerica Mortgage Advisors Inc. v. Lewis* 444 U.S. 11, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979) *California v. Sierra Club* 451 U.S. 287, 101 S. Ct. 1775, 68 L.Ed.2d 101 (1981) *Universities Research Association of Coutu* 450 U.S. 754,

101 S. Ct. 1451, 67 L.Ed.2d 662 (1981) and *Touche Ross & Co. v. Pedington* 442, U.S. 560, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979). The decision was also in accord with *Rapid Transit Advocates, Inc. v. Southern California Rapid Transit District* 752 F.2d 373 (U.S. Court of Appeals 9th Cir. 1985).

In *Duke v. Carolina* 438 U.S. 59 and *U.S. v. Scrap* 412 U.S. 669 the Court addressed standing in relation to problems of nuclear contamination and nationwide recycling programs. These are the only environmental cases cited by the plaintiff to be in conflict with the Appeals Courts' ruling. In contrast to the severe environmental problems addressed in *Duke* and *Scrap* the plaintiff in this case claimed standing based on allegations of increased traffic congestion and decreased property values, without, as the district court and Appeals Court determined, a showing of how these particular plaintiffs will be harmed by the change in use from a steel business to a bus garage.

The Court of Appeals clearly saw through the vagueness of the complaint, the lack of real environmental concerns and the manipulative behavior of Evanston in enacting its zoning change by stating in its opinion:

> "The complaint alleges that the property at 2424 Oakton Street is currently used as a steel business and is zoned for the M-4 Manufacturing District. The complaint also alleges that the use of property as a bus garage is not consistent with the comprehensive plans for the area and requires a special use permit.[2]
>
> The complaint on its face creates a problem in these particular circumstances. Considering the

---

[2]The Agreement of Sale, attached to the complaint as Exhibit B, indicates that during the course of negotiations leading to the agreement the City of Evanston amended its zoning ordinance to change the use of the property as a bus garage from a permitted use to a special use.

present steel business use in light of nothing but some vague and general allegations of environmental harms, we cannot see why or how the new proposed use will not in fact be an environmental improvement. This case does not arise in a vacuum. The property is not a vacant lot. The existing use, a steel business, in not without considerable environmental impact of its own. In these circumstances the plaintiffs' complaint must clearly articulate a "distinct and palpable" injury in fact, within the zone of interests, which NEPA protects, that will result from the property's conversion from a steel manufacturing business, not ordinarily considered an environmental benefit, to a bus garage. See *Warth v. Seldin*, 442 U.S. at 501 (1975). Ordinarily, one would not consider a bus garage, in the typical location, to be environmentally detrimental, and UMTA/FHWA regulations therefore categorically exclude bus garages from the EIS requirement of NEPA. The plaintiffs do not suggest how or why the bus garage will generate more traffic than the going steel business, or that the character of the traffic, buses instead of trucks, will have some significant impact. The plaintiffs do not suggest how or why pollution, noise, or other supposed adverse environmental impacts will be increased by reason of the change from a steel business to a bus garage. It is, of course, not necessary to plead evidence, but in these particular circumstances the plaintiffs must provide some suggestions that this change causes particular and specific adverse environmental consequences affecting these plaintiffs.

The plaintiffs must demonstrate that their environmental concerns are not so insignificant that they ought to be disregarded altogether." *Robinson v. Knebel*, 550 F.2d 422, 425 (8th Cir. 1977)."

Therefore, the environmental concerns raised by the plaintiffs in the present case do not fall within the area of concerns raised in *Duke v. Carolina*. In *Duke* the Court was asked to determine questions of standing of citizens to question the use of nuclear power plants in close proximity

to the plaintiffs living and working environment. The complaint alleged effects of the operation of the plant to include production of radiation which would invade the air and water and an increase in the temperature of a nearby lake. These severe effects of the nuclear power plant were the type of injuries the Court deemed adequate to satisfy the "injury in fact" test.

To say that the issues raised in *Duke v. Carolina* and *U.S. v. Scrap* are similar to the environmental concerns raised by the plaintiffs in this case is ludicrous at best. The Seventh Circuit Court of Appeals saw through the sham argument of the plaintiffs and this Court should also do so by denying the Petition for Writ of Certiorari.

Therefore on the issue of standing, the Appellate Court clearly issued its ruling on principles established by this Court and not, as the plaintiff alleges, in conflict with this Court's prior decisions.

The plaintiff further claims that the facts as alleged should have entitled the plaintiff to proceed with their complaint. They allege that although jurisdiction and standing pursuant to 5 USC 702 (APA) were not pleaded, the court should have taken notice of the facts as pleaded to include the APA as a basis for jurisdiction and standing and the court should have granted the plaintiff leave to amend.

The plaintiffs claim the decision was in conflict with *Conley v. Gibson*, 355, U.S. 41, *Foman v. Davis*, 371, U.S. 178, *United States v. Haughman*, 364, U.S. 310 and *Havens v. Coleman*, 455, U.S. 363. The cases cited by plaintiff stand for the proposition that a complaint must be interpreted liberally and a mistake in pleading should not be used to extinguish a genuine right of a party.

Such is not the case in the present instance. As is stated above by the quotation from the Court of Appeals decision, the Court took into account the question of liberal allowances for pleading, but rejected the plaintiffs' environmental claims as *de miniumus*. Furthermore, even if

the Court had taken the plaintiffs' claim of jurisdiction and standing pursuant to the APA into account, if the statutes alleged as the basis for jurisdiction and standing (49 USC 1602 & 42 USC 4321) do not confer private rights of action, the allegation of jurisdiction pursuant to 5 USC 702 does not operate as an independent basis of jurisdiction. *Califano v. Sanders*, 430, U.S. 99 and *Valley Forge v. Americans United* 454 U.S. 464.

Furthermore, the plaintiff failed to seek leave to amend, but instead relied on its complaint in pursuing its action in the Appellate Court.

Therefore, contrary to the plaintiffs' claims the decision of the Seventh Circuit Court of Appeals was not in conflict with decisions of this Court, but was instead in accord with and based on decisions of this Court.

As a further inducement to this Court to deny the petition for certiorari, the matters raised by the complaint relating to the proposed use of the facility as a bus garage, and the denial of the special use permit are more properly issues which should be decided by local courts and of which this Court has traditionally kept a hands off policy. See *Larkin v. Grendels Den, Inc.* 459 U.S. 116, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982).

II.

ARTICLE III STANDING

The issue before this Court is whether the City of Evanston, its mayor and alderman properly brought their claim before the district court by showing that they had "standing" to bring this action in the Federal Court.

Under Article III of the Constitution, federal courts do not have jurisdiction over a claim unless there is an "actual case or controversy." The standing doctrine is one component of the case or controversy requirement. See *Scott v. Rosenberg*, 702 F. 2d 1263 at 1267 (9th Cir. 1983)

cert denied 104 S.Ct. 1439 (1984). The policy concern behind the standing doctrine is that each party have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness exists which sharpens the presentation of issues upon which the court so largely depends." *Baker v. Carr*, 369 U.S. 186, 7 L.Ed.2d 663 (1962)

An essential element of the standing requirement is that "the plaintiff . . . show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 at 99 60 Ed.2d 66 (1979)

This court has restated the test for standing in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, (1982). In *Valley Forge* the Court held:

> " . . . at an irreducible minimum, Art III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant' . . . and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision'."

Furthermore, two additional elements necessary to properly allege standing when challenging an action of a federal or state agency are that the challenged action has caused the plaintiff injury in fact and that the interest sought to be protected by the complainant must arguably be within the zone of interests to be protected or regulated by the statute in question. *Preston v. Heckler*, 734 F.2d 1359 (1984)

The "statutes in question, alleged by the plaintiffs in their complaint to create standing are the Urban Mass Transportation Systems Act, 49 USC 1601 et seq (UMT Act) and the National Environmental Policy Act, 42 USC sec. 4321 et seq (NEPA).

The plaintiffs later claimed to have alleged enough facts to bring their complaint under the Administrative Procedure Act 5 USC sec. 702 (APA) although the APA was not alleged as a basis for jurisdiction or standing in their original complaint and the plaintiffs did not seek leave to amend. Notwithstanding the general rule that one cannot raise issues not addressed in the lower court for the first time on appeal see *Lektro Vend Corp. v. Vendo Co.* 545, F.2d 1050 (7th Cir. Ct. Appeals 1976), the plaintiffs claimed in their appeal to the Seventh Circuit Court of Appeals that jurisdiction under the APA was proper.

However, as this Court held in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 US 464 at 487-88 N 24

> "Neither the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Article III."

Furthermore, this Court in *Califano v. Sanders* 430 U.S 99 at 107 held:

> "We thus conclude that the APA does not afford an implied grant of subject matter jurisdiction permitting federal review of agency action."

Therefore, merely claiming injury due to a federal agency's action does not automatically clothe the claimant with Article III standing. The "injury in fact" and "personal stake in the outcome" test must still be addressed. The plaintiff must also meet the requirement that when claiming injury as a result of agency action, one must show that the interest sought to be protected by the complainant must be within the zone of interests to be protected or regulated by the statute.

The Seventh Circuit took into account the tests addressed in *Baker v. Carr* 369 U.S. 186, *Gladstone Realtors v. Village of Bellwood* 441 U.S. 91, and *Valley Forge v. Americans United* 454 U.S. 464. They correctly applied

the issues raised in the complaint to those tests and determined that the plaintiffs failed to allege a sufficient injury in fact or personal stake in the outcome.

Notwithstanding the plaintiffs failure to pass the injury in fact and personal stake in the outcome tests to determine standing, the plaintiffs had an additional burden to meet. That of showing that the statutes allegedly violated by UMTA created private rights of action, and that if a right is conferred by the statute, that the interest sought to be protected is within the zone of interest to be protected by the statute.

The Seventh Circuit addressed those issues and basing their decision on law as established by this Court correctly determined that the plaintiffs lacked Article III standing.

III.

STANDING UNDER THE UMT ACT

The district court and the Seventh Circuit Court of Appeals correctly held that the UMT Act does not create a private right or action and none can be implied.

The lower courts correctly followed this courts' holdings in *Merrill Lynch, Pierce, Fenner & Smith v. Curran* 456 U.S. 353 at 377-78 (1982) and in *Cort v. Ash* 422 U.S. 66 at 78 (1975) that in determining whether a private right of action can be implied, a court must look to the intentions of Congress in enacting the statute.

"In determining Congressional intent, the language of the statute and its legislative history should first be examined." *California v Sierra Club,* 451 U.S. 287, 297-98 101 S.Ct. 1775, 1781 68 L.Ed. 101 (1981) "If they do not suggest the statute was intended to create federal rights for the special benefit of a particular class of persons, it is unnecessary to inquire into such other factors as whether availability of a private remedy would further the statutory purpose." See *California v Sierra Club,* 451 U.S. at 297-98.

This Court has drawn a distinction between statutes whose language focuses on a right granted to a benefitted class of persons; where a private cause of action is generally found and statutes framed as "general prohibition or command to a federal agency"; where a cause of action is seldom implied. In *Universities Research Ass'n, Inc. v Coutu*, 450 U.S. 754, 772, 101 S.Ct. 1451, 1462, 67 L.Ed.2d 662 (1981), the Court declined to imply a private right of action under the Davis-Bacon Act, which requires contracts for government work to contain minimum wage stipulations. Though clearly intended to benefit employees, the statute did not confer rights directly on the employees, but instead imposed obligations on federal contracting agencies. In the words of the Court, the statute was "simply phrased as a directive to federal agencies engaged in the disbursement of public funds.' " quoting *Cannon v University of Chicago*, 441 U.S. 677, 693 99 S.Ct. 1946, 1955 60 L.Ed.2d 560 (1979).

The provisions of the UMT Act the instant plaintiffs allege were violated do not focus on the rights of particular persons but on duties of the federal administrators of the program and of the applicants for assistance.

A Ninth Circuit case, *Rapid Transit Advocates, Inc. v. Southern California Rapid Transit District*, 752 F.2d 373 (US Ct Appeals 9th Cir.) (1985) is directly on point with the plaintiffs' claim of standing under the UMT Act. In that case, the court held that where the plaintiffs attempted to block a decision by the Urban Mass Transit Administration to grant federal funds for the design and engineering of a mass transit system they could not proceed because neither 49 USC 1601 (UMT) Act) nor 42 USC sec. 4321 (NEPA) created private remedies and none could be implied.

Therefore, the plaintiffs lack standing to invoke the courts' jurisdiction pursuant to 49 USC 1601 (UMT Act) because that act does not create a private remedy as the Court of Appeals correctly ruled.

IV.

STANDING UNDER THE NEPA

Plaintiffs further allege that they have been injured by UMTA's failure to prepare an Environmental Impact Statement or otherwise to take into account the effects on the environment of a bus garage at the property purchased with the grant money. To successfully invoke the courts' jurisdiction the plaintiffs must go through the same analysis of NEPA as the UMT Act to determine Congressional intent regarding whether NEPA creates private rights of action, and if so, whether the plaintiff can show that he personally suffered actual or threatened harm as a result of the conduct of the defendant, whether the injury fairly can be traced to the challenged action, whether the injury is likely to be redressed by a favorable decision and lastly whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute in question *Preston v Heckler*, 734 F.2d 1359 (1984)

As was discussed earlier herein, the Ninth Circuit Court of Appeals in *Rapid Transit Advocates, Inc. v Southern California Rapid Transit District*, 752 F.2d 373 has held that 42 USC 4332 does not create private rights of action and none is implied.

The Seventh Circuit Court of Appeals ruled that NEPA 42 USC 4332 may create a private right of action but determined that the City of Evanston, its mayor and alderman had not satisfied other requirements of standing to be able to successfully invoke the Courts' jurisdiction.

The Appeals Court also looked to the language of 42 USC 4332 (2) (c) in which an environmental impact statement must be prepared on all major federal actions significantly affecting the quality of the human environment.

The Court of Appeals saw through the basic flaw of the plaintiffs' claim of environmental harm. What harm to the environment could come from changing the use of a

facility from a steel business to a bus garage? The court correctly ruled that the plaintiffs' claim of environmental harm should be disregarded.

A careful reading of plaintiffs' complaint and their petition for certiorari discloses their true claim of damage and it is clearly non-environmental. The plaintiff, City of Evanston, will lose property tax revenues as a result of the ownership of the property by a municipal corporation. This allegation is clearly not within the zone of interest to be protected by NEPA and this bare claim could not legally stand alone as the basis for Evanston changing its zoning ordinance to require the Suburban Bus Division of the Regional Transportation Authority to apply for a special use permit, let alone stand as the basis for standing in this action.

V.

TAXPAYER STANDING

The plaintiffs cannot claim as a basis for standing their position as taxpayer, although their claims of damage by overpayment of a fair price and misappropriation of federal funds would indicate their reliance on that status as a basis for standing.

The decision of the Court of Appeals was directly based on this Court's ruling in *Valley Forge v. Americans United*, 454 U.S. 464 and *Flast v. Cohen*, 392 U.S. 83 wherein it was held that taxpayer standing is limited to constitutional challenges directed at congressional actions. The grant by UMTA to the Regional Transportation Authority is a use of federal funds involving no congressional action.

CONCLUSION

The plaintiffs' petition for writ of certiorari should be denied. The decision of the Seventh Circuit Court of Appeals affirming the district courts order of dismissal due to lack of standing was proper and was based on long established principles of standing having its root in Article III of the Constitution.

The statutes which the plaintiffs claim were violated do not create private rights of action and none are implied. The plaintiffs lack standing as taxpayers.

For the above and foregoing reasons, the Regional Transportation Authority and Pace, Suburban Bus Division of the Regional Transportation Authority requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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No. 87-549

In the Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF EVANSTON, ET AL., PETITIONERS

v.

REGIONAL TRANSPORTATION AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly dismissed petitioners' complaint for lack of standing.

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OPINION BELOW

The decision of the court of appeals (Pet. App. 1a-11a) is reported at 825 F.2d 1121.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1987. The petition for a writ of certiorari was filed on October 3, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This action concerns a tract of land in the City of Evanston, Illinois, which respondent Regional Transportation Authority purchased from respondent National Steel Service Center, Inc., for use as a bus maintenance facility. The purchase and conversion of the tract is being funded, in part, with federal funds provided by respondent Urban Mass Transportation Administration (UMTA)

of the United States Department of Transportation.[1] Petitioners alleged that the purchase and operation of the tract as a bus maintenance facility would violate the Urban Mass Transportation Act of 1964, 49 U.S.C. App. (& Supp. III) 1601 *et seq.*, and the National Environmental Policy Act of 1969, 42 U.S.C. (& Supp. III) 4321 *et seq.* Pet. App. 1a-2a. The district court dismissed the complaint for lack of standing and because it found that the statutes petitioners sought to invoke do not create a private right of action (*id.* at 12a-13a). The court of appeals affirmed (*id.* at 1a-11a).

1. The Urban Mass Transportation Act (UMT Act) authorizes the Secretary of Transportation to make grants or loans to assist states and local public bodies and agencies in financing the planning, development, construction and improvement of mass transportation projects. Prior to approving funds for a project, the Secretary must be satisfied that various requirements set forth in the UMT Act have been met. The applicability of the various statutory requirements depends upon the section of the UMT Act under which financial assistance is sought. The Secretary of Transportation administers this grant and loan program through UMTA. See generally *Rapid Transit Advocates, Inc.* v. *Southern Cal. Rapid Transit Dist.*, 752 F.2d 373, 375-376 (9th Cir. 1985).

UMTA, as are other federal agencies, is also bound by the requirements of the National Environmental Policy Act of 1969 (NEPA). Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C), provides that all federal agencies shall "include in every recommendation or report on proposals

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[1] Following the initiation of this suit, UMTA provided federal funding for the purchase of the tract and the tract was conveyed to the Regional Transportation Authority. UMTA has not yet provided funding to complete the conversion of the existing structure.

for legislation and other major Federal actions significantly affecting the quality of the human environment" a detailed statement (customarily referred to as an "Environmental Impact Statement" or "EIS") concerning the environmental impact of the proposed action and related matters. An EIS need not be prepared where the proposed action will not "significantly" affect the quality of the human environment.

The Council on Environmental Quality (CEQ) has promulgated regulations governing agency compliance with NEPA, including the establishment of uniform procedures for all federal agencies to follow in determining whether, when, and how to prepare an EIS. 40 C.F.R. Pt. 1500. These regulations also direct that each federal agency adopt its own procedures, as necessary, to supplement the CEQ procedures. 40 C.F.R. 1507.3(a). In response to this directive, UMTA and the Federal Highway Administration have promulgated regulations at 23 C.F.R. Pt. 771 for implementing NEPA and the core CEQ procedures.

Section 1507.3(b) of the CEQ regulations (40 C.F.R. 1507.3(b)) requires that the procedures adopted by the agencies include specific criteria for, and identification of, three classes of action. Class I projects include actions that may significantly affect the environment and thus require an EIS. Class II projects, termed "categorical exclusions," include actions that do not normally have a significant effect on the environment and thus would not require an EIS. Class III projects are those in which the environmental impacts cannot be initially determined. For Class III projects, the agencies have to prepare an environmental assessment to determine whether an EIS is required.[2]

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[2] An "environmental assessment" is a public document setting forth concisely the evidence and analysis that leads an agency to conclude that a given action will or will not have a "significant impact" so as to require a full EIS. 40 C.F.R 1508.9.

Consistent with CEQ's classification procedures, UMTA's regulations enumerate 29 categorical exclusions. 23 C.F.R. 771.115(b)(1)-(29). Categorical exclusions are defined in 23 C.F.R. 771.117 as "categories of actions which do not involve significant environmental impacts or substantial planning, time or resources. These actions will not induce significant foreseeable alterations in land use, planned growth, development patterns, or natural or cultural resources." Categorical exclusions include (23 C.F.R. 771.115(b)(25)):

> Construction of new bus storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and located on or near a street with adequate capacity to handle anticipated bus and support vehicle traffic.

2. The City of Evanston, its mayor, and two aldermen commenced this action by filing a complaint (Pet. App. 14a-29a) alleging that respondent Suburban Bus Division (PACE), a division of the Regional Transportation Authority (RTA),[3] was planning to purchase a tract of land in Evanston from respondent National Steel Service Center, Inc., and thereafter convert the property for use as a bus maintenance facility. The complaint further alleged that this purchase and conversion was being funded in part with federal funds from UMTA, which was named as a defendant along with the United States Department of Transportation, PACE, RTA, and National Steel (*id.* at 16a).

The complaint contained three counts. Count I (Pet. App. 27a) alleged that the proposed sale of the tract from

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[3] RTA is a municipal corporation organized and operating pursuant to the provisions of the Regional Transportation Authority Act, Ill. Ann. Stat. ch. 111 2/3, paras. 701.01 *et seq.* (Smith-Hurd Supp. 1987), for the purpose of providing aid and assistance for public transportation in northeastern Illinois.

National Steel to PACE was "unreasonable, invalid and void and against public policy" because PACE had agreed to a purchase price more than $1 million over the fair market value of the tract, as estimated by petitioners. Count I also alleged that the Agreement of Sale (*id.* at 37a-44a) was invalid because it had not been approved by PACE's Board of Directors.

Count II (Pet. App. 27a) asserted that the proposed sale was null and void because no proper notice had been given for public hearings on the proposed acquisition and "the City of Evanston was not given direct notice of said hearings" (*ibid.*). Count II further alleged that the project review conducted by the Northeastern Illinois Planning Commission was invalid because the hearing notice understated the amount of money involved in the acquisition of the property.

Count III (Pet. App. 28a) alleged that, under NEPA, UMTA could not validly provide federal funds for the project without first filing an EIS because such funding would be a major federal action concerning a project that would be "highly detrimental to the environment and public health and safety of the individual plaintiffs and the City of Evanston * * *" (*ibid.*). Count III asserted that UMTA had incorrectly determined that the project was covered by the categorical exclusion set forth in 23 C.F.R. 771.115(b)(25) and, consequently, the agency had wrongly concluded that no EIS was required.

The prayer for relief (Pet. App. 28a-29a) requested the court to enter judgment declaring the Agreement of Sale to be null and void and that PACE and UMTA had acted arbitrarily, unreasonably and against public policy by agreeing to the proposed sale price. Petitioners also requested the court to declare that the failure to prepare an EIS was contrary to law; that "lack of proper notice was given by UMTA and by [the Northeastern Illinois Planning Commission] with respect to [the project review] and

the approval of the grant herein"; and that the location of the proposed facility would be "highly detrimental" to the environment and the public health and safety of respondents. *Ibid.* Finally, petitioners requested the court to enter temporary and permanent injunctive relief barring respondents from proceeding with the proposed action, including the disbursement of federal funds (*ibid.*).

The district court dismissed the complaint on respondents' motions (Pet. App. 12a-13a).[4] The court found that petitioners lacked standing because the complaint failed sufficiently to allege any distinct injury to petitioners from the proposed action. The court also concluded that the federal statutes upon which petitioners' allegations were premised do not create a private right of action.

3. The court of appeals affirmed in a per curiam opinion (Pet. App. 1a-11a). First, the court found (*id.* at 4a-6a) that the UMT Act does not create a private right of action. Second, the court held in any event (*id.* at 11a) that petitioners lacked taxpayer standing to challenge the disbursement of funds by UMTA or PACE. And, third, the court ruled that, due to their failure to allege some distinct injury in fact to their environmental interests, the petitioners "have not sufficiently demonstrated that they have standing under NEPA" (*ibid.*). "It is, of course," the court noted, "not necessary to plead evidence, but in these particular circumstances [petitioners] must provide some sug-

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[4] Petitioners state (Pet. 3, 13) that the district court dismissed the complaint without giving them leave to amend. Nothing in the dismissal order, however, indicated that the court would deny leave to file an amended complaint—the order was simply silent concerning leave to amend (Pet. App. 12a-13a). Rule 15(a), Fed. R. Civ. P., states that leave to amend "should be freely given when justice so requires." Petitioners, however, never attempted or sought leave to amend their complaint, but instead elected to stand on their original complaint and appeal.

gestions that this change causes particular and specific adverse environmental consequences affecting [them]" (*id.* at 10a). The court stated that plaintiffs had failed to allege how the bus garage would be more detrimental to them than the steel business previously on the site. The individual petitioners did not even "allege where they live in relation to the property"; "[n]or do the City and its mayor allege specifically * * * how some conjectured decline in property values and loss of tax revenues, even if considered to be within the zone of protected interests, will result from the change of use" (*id.* at 10a-11a).

ARGUMENT

In order to establish his standing to maintain a suit, a plaintiff must allege, inter alia, "that the challenged action has caused him injury in fact, economic or otherwise." *Association of Data Processing Service Orgs.* v. *Camp*, 397 U.S. 150, 152 (1970). The injury alleged must be "distinct and palpable" (*Warth* v. *Seldin*, 422 U.S. 490, 501 (1975)), and not "abstract" or "conjectural" or "hypothetical." *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101-102 (1983); *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974). A plaintiff cannot obtain standing by asserting some "generalized grievance" against the defendant; rather, he is required to "allege specific, concrete facts demonstrating that the challenged practices harm *him*" (*Warth* v. *Seldin*, 422 U.S. at 508 (emphasis in original)). Such facts must affirmatively appear in the record (*Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534 (1986)) and the burden of alleging them rests squarely upon the plaintiff (*Warth* v. *Seldin*, 422 U.S. at 518 ("It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.")).

The courts below correctly concluded that petitioners had failed to satisify this fundamental requirement. No

important or novel question of standing is posed by the facts of this case. Petitioners' complaint was properly dismissed on a straightforward application of settled principles, and their fact-bound assertion that the complaint did set forth specific allegations of injuries sufficient to meet the requirements of standing does not warrant further review.

a. Count I of the complaint (Pet. App. 27a) alleged that the Agreement of Sale was unreasonable, invalid, and contrary to public policy because PACE had agreed to pay National Steel a purchase price greatly in excess of the fair market value of the tract. The complaint, however, does not specify how petitioners would be injured by the supposedly excessive purchase price, above and beyond their general status as taxpayers. The individual petitioners merely alleged that they are taxpayers (*id.* at 15a), and they "are plainly without standing to sue as taxpayers." *Valley Force Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 482 (1982). As for petitioner City of Evanston, the complaint fails to contain any allegation whatsoever that it will be required to bear, directly or indirectly, any portion of the allegedly excessive cost of the land.

Count I also alleged that PACE's Board of Directors had failed to approve the specific amount of the purchase price. But even if we assume that there is some legal requirement that they do so (and no such requirement is stated in the complaint), petitioners have not demonstrated that they have suffered any legally-cognizable injury thereby. The purported injury, if any, would be only to the Board, whose authority was supposedly usurped by its own officers.

b. Count II of the complaint (Pet. App. 27a) alleged that proper notice of public hearings concerning the proposed acquisition was not given and that "the City of Evanston was not given direct notice of said hearings." Nowhere in the complaint or record, however, is there any

indication that respondents breached any legal duty to give such notice or that Evanston and the individual petitioners did not actually receive effective notice of, and have an opportunity to attend, any hearings. Indeed, Paragraph 17 of petitioners' complaint (*id.* at 23a-24a) appears to indicate that petitioners or their representatives did attend the project-review hearing and that "as a result of said hearing, the official project review recommendations of the Northeastern Illinois Planning Commission included the objections to the proposed acquisition and construction of the northshore garage facility * * *."

Count II also alleged that the review conducted by the Northeastern Illinois Planning Commission "was totally invalid in that the notice understated the amount of money involved in the acquisition of the subject property" (Pet. App. 27a). But the record contains no indication that petitioners were in any way injured by this alleged understatement. As we have noted, there is no allegation that petitioners' own funds, other than as general tax revenues, will be used to pay for the project.

c. Count III of the complaint (Pet. App. 28a) alleged that UMTA was required by NEPA to prepare an EIS prior to providing federal funds for the project. The claimed injuries from this purported omission were set out in Paragraph 23 of the complaint (*id.* at 26a-27a) where it was alleged, in conclusory terms, that the project would deprive Evanston and its citizens of tax revenues, that it would be in violation of local zoning, and that it would cause traffic congestion, pollution, noise and other, unspecified, environmental impacts, all leading to lower property values for nearby residential properties.

These generalized allegations are insufficient to establish standing to maintain an action under NEPA.[5]

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[5] Petitioners err in asserting (Pet. 25) that the court of appeals "conceded standing under NEPA," but "then concluded that the allegations of the complaint were insufficient to state a cause of action under NEPA." The court of appeals expressly based the NEPA por-

Pecuniary injuries, such as decreased property values and loss of city tax revenues, are not even "arguably within the zone of interests to be protected or regulated" by NEPA (*Association of Data Processing Service Orgs.*, 397 U.S. at 153). NEPA was enacted to further environmental, not pecuniary, interests. *Glass Packaging Institute* v. *Regan*, 737 F.2d 1083, 1091-1094 (D.C. Cir.), cert. denied, 469 U.S. 1035 (1984); 40 C.F.R. 1508.14. Nor is the bare allegation that the proposed project will violate Evanston's zoning ordinance and introduce an inharmonious land use sufficient to carry plaintiffs' burden of alleging specific facts showing a definite, concrete injury to their environmental interests. Petitioners have not alleged any facts that tend specifically to indicate that the proposed use of the tract would have environmental consequences that differ in any significant degree from the prior industrial use of the tract.[6]

Finally, the complaint alleges that the project would cause "congestion, pollution, noise and other adverse environmental impacts" (Pet. App. 27a). But the individual petitioners do not allege that they reside in, or use, the

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tion of its decision upon lack of standing and not upon failure to state a claim. The court concluded that portion of its opinion by stating (Pet. App. 11a (citation omitted)):

> The complaint is framed in general boilerplate language which demonstrates no specific relation of these plaintiffs to this piece of property. Standing is not conferred under NEPA merely because plaintiffs generally disfavor a proposed use of a particular piece of property, if they do not allege some distinct injury in fact to their environmental interests. Plaintiffs have not sufficiently demonstrated that they have standing under NEPA.

[6] As the court of appeals noted (Pet. App. 9a n.2), it was not until after PACE had commenced negotiations with National Steel for purchase of the property that Evanston amended its zoning ordinance to change the use of the property as a bus garage from a permitted use to a special use. The court of appeals concluded that petitioners could not establish standing "regardless of how the zoning ordinance has been manipulated during this controversy" (*id.* at 10a).

area that would purportedly be affected by these environmental impacts. *Sierra Club* v. *Morton*, 405 U.S. 727, 737-741 (1972). And the City of Evanston has not alleged any specific, evidentiary facts tending to indicate how the proposed project would result in any additional evironmental impacts beyond those already present from the existing industrial use of the tract.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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